Communication No. 1243 / 2004

under the

Optional Protocol to the International Covenant on Civil and Political Rights

Response to the Australian Government's Submission on Admissibility and Merits

10 February 2005

Submitted by the author's

legal representatives acting on referral from the

Public Interest Law Clearing House

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PART 1. BACKGROUND AND PRELIMINARY COMMENTS

A. History of communication

1 The following table sets out a chronology of this communication:

Table 1. Key dates in Communication 1243 / 2004

Date	Action
23 January 2004	The author's representative submits the Communication to the Committee.
26 January 2004	The Committee requests the State party: • to provide information and observations on admissibility and merits; and • under interim measures provisions,[1] to not deport the author until the Committee has had an opportunity to address the State party's submissions.
26 October 2004	The State party presents its submissions on admissibility and merits. The State party reserves its rights in relation to the Committee's request for interim measures.
9 November 2004	The Committee invites the author to make comments on the State party's Submission on admissibility and merits.
23 December 2004	The author's representative requests the State party to provide materials cited in the State party's Submission which are not publicly available. The author's representative requests the Committee for an extension of time to 10 February 2005 for the submission of comments by the author on the State party's Submission.
28 December 2004	The Committee grants the author's representative's request for an extension of time until 10 February 2005.
31 January 2005	The State party, through the Office of International Law of the Attorney-General's Department, notifies the author's representatives that the request for materials cited in the State party's Submission has been referred to DIMIA for consideration.

[1] Now under Rule 92 of the Rules of Procedure.

Date	Action
7 February 2004	The author's representatives receive a response from DIMIA stating that the materials requested by the author on 23 December 2004 need to be sought through Australia's standard freedom of information procedures.
10 February 2005	The author's representatives submit this Response to the State party's Submission.

B. Observations concerning materials requested from State party

2 As at the date of this Response the author's representatives have not received the materials cited in the State party's Submission and not publicly available which were requested by the author's representatives on 23 December 2004.

3 The author's representatives note that the failure of the State party to provide the materials requested, and the delayed and unhelpful response of DIMIA, has adversely affected the ability of the author's representatives to directly respond to key aspects of the State party's Submission, including the State party's evidence concerning the likelihood of the author being subjected to torture, mistreatment or punishment prohibited by article 7.

C. Clarification, and changes to details relating to the author

4 Please note that in the Communication dated 23 January 2004, the author's authorised representative, Mr Peter Job, was inadvertently noted on the first page of that communication as the 'author'. The proper author, who is referred to as the author in this document, is Mr Mohammad Taha.

5 Since the author made his original communication to the Committee, the following details have changed:

(a) **author's representatives** — the author's original communication was made by his authorised representative, Mr Peter Job. Mr Job subsequently engaged the following qualified legal practitioners, who are acting on referral through the Public Interest Law Clearing House, Victoria, Australia to assist in the preparation of this Response:

Alexandra Richards, QC
Level 10, Latham Chambers,
500 Bourke Street,
Melbourne VIC 3000

Associate Professor Dianne Otto
Faculty of Law
University of Melbourne
Parkville VIC 3010

Kristen Hilton, Manager, Law Institute of Victoria Legal Assistance Scheme
and

Tabitha Lovett, Manager, Public Interest Law Clearing House
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Level 1, 550 Lonsdale St
Melbourne 3000

Peter Henley, Solicitor
and
Sanya Smith, Articled Clerk
Mallesons Stephen Jaques
Level 50, 600 Bourke Street
Melbourne VIC 3000

(b) **location in detention centre** — the author is currently detained in the Baxter Detention Centre in Port Augusta, South Australia.

(c) **address for correspondence** — please address all correspondence to:

Tabitha Lovett,
Manager, Public Interest Law Clearing House
Level 1, 550 Lonsdale St
Melbourne VIC 3000
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D. Request for anonymity

6 The author respectfully requests that the Committee require his full name and any identifying facts and material facts be withheld and made anonymous in any publication of the views of the Committee, or in the publication of any submissions or ancillary material in relation to this communication. In lieu of the author's name, the author requests that he be referred to as 'S' or simply as the author in all publications and released materials.

7 This request is made due to the increased likelihood of detention and mistreatment the author would face in Syria if it is publicly known that he sought asylum in Australia or made this communication, in the event that he is removed to Syria by the State party.

8 The author notes that the Committee has permitted authors such anonymity in the published views of the Committee in relation to previous communications.[2]

E. Clarifications and additional supporting information

9 The clarifications and additional supporting information included in this Response are included solely to address the questions of admissibility and merits raised by the State party. They raise no new allegations, but merely support the allegations originally communicated. The evidentiary material set out in this Response is drawn from both the Delegate's Decision and the RRT Decision, and also from several interviews with the author conducted by the author's legal representatives for the purposes of preparing this Response.

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[2] *A v Australia* Communication No 560/1993, *Mr C v Australia* Communication No 900/1999.

10 The author notes that the inclusion in this response of these clarifications or this additional supporting information is consistent with the information request procedures set out in sub-Rules 86(1)(e) and (f) of the Committee's Rules of Procedure.

F. Summary of comments and submissions

11 In response to the submissions of the State party regarding admissibility, the author respectfully submits that the claims communicated to the Committee are admissible because:

(a) in relation to all claims, all available and effective local remedies have been exhausted; and

(b) in relation to the claim alleging a potential violation of article 7, that the claim has been sufficiently substantiated.

The reasons supporting these submissions are set out in Part 3. ADMISSIBILITY.

12 In response to the submissions of the State party regarding the merits, the author respectfully submits that the claims are meritorious, as follows:

(a) **Article 7** — because it is a reasonably foreseeable result of the removal of the author to Syria that the author would be subjected to torture and cruel, inhuman and degrading treatment and punishment, and possibly execution, at the hands of the PFLP-GC which is prohibited by article 7, and that as a result the State party is under an obligation of *non-refoulement* in relation to the author;

(b) **Article 9(1)** — because:

(i) the law under which the author is detained is arbitrary, and therefore unlawful in a substantive sense, which is a violation of article 9(1); and

(ii) further, the author's prolonged detention, beyond what was reasonably necessary to establish his identity and the details of his claim, is arbitrary and therefore a violation of article 9(1) because no factors were identified, particular to him, that justified it;

(c) **Article 9(4)** — because:

(i) the State party is obliged to provide for effective judicial review of immigration detention;

(ii) this extends beyond testing the legality of detention under domestic law, and also requires that a court must be able to order release if the detention is arbitrary, or otherwise incompatible with any of the provisions of the Covenant; and

(iii) as a result, the privative clause in section 474 of the *Migration Act* is in patent violation of the State party's obligations under article 9(4), as the power of the courts to review the merits of the author's detention has been extinguished.

The reasons supporting these submissions are set out in Part 4. MERITS.

G. The author is still in detention

13 The author has now been in detention for over four years pending the outcome of his application for a protection visa, the determination of his appeals to overturn the State party's decision to not grant the author a visa and the process of this communication.

PART 2. THE AUTHOR'S STORY

A The author's background

14 The author was born to Palestinian parents in 1969 and grew up in Syria. After completing his compulsory military training with the Palestine Liberation Army ('**PLA**') in 1985, the author joined the Palestine Liberation Organization ('**PLO**') and subsequently the People's Front for the Liberation of Palestine-General Command ('**PFLP- GC**') from 1992 until March 2000.

15 During his time with the PFLP-GC, the author worked as a clerk at the Al Yarmouk office in Damascus, undertaking general duties such as office administration and dealing with visitors who came to the office. In the eight years he was posted at the office in Al Yarmouk, he was not sent on any missions and was not directly involved in any acts of terrorism.[3] However, due to his work in the Al Yarmouk office he was aware of various missions being planned and undertaken. Similarly, although the author was a relatively low ranking member of the organisation, he was privy to sensitive information about PFLP-GC strategies and aims.

B Background to the PFLP-GC and its links with Syria

16 The PFLP-GC is a Palestinian terrorist organisation known for its unequivocal rejection of any kind of political settlement with Israel, and its reliance on international terrorism to thwart any political process. The fundamental themes directing the PFLP-GC's activities are 'pan-Arabism, a total rejection of Israel's right to exist and advocation of armed struggle as the only way to advance the Palestinian cause.'[4]

17 Since its inception, the group has received financial, military and logistical support from Syria, in the form of arms, finances and bases for its operations. The organisation's headquarters are in Damascus and its main terrorist activity against Israel is carried out from its camps, through the frontier with South Lebanon.[5]

18 With the end of the Cold War, Syria grew increasingly anxious to improve relations with the West. Under pressure from the US, Damascus prohibited the PFLP-GC from pursuing terrorist operations at an international level. Accepting directions from Damascus, the

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3 RRT Decision [34].

4 David Tal, 'The International Dimension of PFLP-GC Activity' (The Jaffe Center for Strategic Studies, 1990) 1 <http://www.ict.org.il/Articles/pflp-gc1.htm>. Since 1968, the PFLP-GC has been headed by Ahmed Jibril, a former officer in the Syrian army. The group began as the Palestine Liberation Front ('**PLF**') and after a brief and unsuccessful merger with the PFLP headed by George Habash, Jibril formed a splinter group known as the PFLP-GC. At the time of the breakaway Jibril claimed that the PFLP-GC would focus less on politics and more on fighting. During the 1970-'80s the group earned international notoriety for devastating acts of terrorism, including claiming responsibility for the first-ever Palestinian suicide bombing after three PFLP-GC militants strapped with explosives, killed themselves and eighteen hostages in Northern Israel. The PFLP-GC has also claimed major involvement in the Lockerbie attack, the Pan-Am explosion above Lockerbie in 1988, which resulted in the death of two hundred and seventy passengers: 'Sponsoring State Terrorism: Syria and the PFLP-GC' *Middle East Intelligence Bulletin* Vol 14, No.9. page 2.

5 'Sponsoring State Terrorism: Syria and the PFLP-GC' 14(9) *Middle East Intelligence Bulletin* 2 <http://www.meib.org/articles/0209_s1.htm>.

group's focus became more regional[6] concentrating on guerrilla operations in Southern Lebanon, small scale attacks in Israel, the West Bank and the Gaza Strip.[7]

19 On 21 May 2003, the United States of America State Department in a report entitled 'Patterns of Global Terrorism – Overview of State-Sponsored Terrorism' ('**the Report**') named Syria as one of the seven state sponsors of global terrorism, noting that Syria continued to 'provide a safe haven and logistics support to a number of terrorist groups.[8]' The PFLP-GC is among the five groups named in the Report.

20 On 11 November 2003, in response to the Report and the US's agenda to get tough with recalcitrant Arab states, the US Congress passed the *Syria Accountability and Lebanese Sovereignty Restoration Bill 2003* ('**the Bill**'). The Bill authorises tough new sanctions on Syria for its close ties to militant extremists. Section 3 of the Bill provides that:

> The Government of Syria should immediately and unconditionally halt support for terrorism and permanently and openly declare its total renunciation of all forms of terrorism, and close all terrorist offices and facilities in Syria, including the offices of Hamas, Hizballah, the Popular Front for the Liberation of Palestine, and the **Popular Front for the Liberation of Palestine — General Command.** (Emphasis added)

Section 4(1) of the Bill also states that Syria will be held responsible for the actions and attacks of the above groups which have bases and facilities in Syria and Lebanon. Although the Bill did not receive the unequivocal support of the Bush Administration, in a letter to US Congressman Robert Wexler, President Bush stated that at this point in time the Administration was pursuing a 'number of initiatives to reverse Syria's unacceptable behaviour.'[9]

21 Further, current research from a number of independent and government sources details Syria's ongoing close relationship with the PFLP-GC.[10] In light of this readily available research and in particular, taking into account the US Government's strong denunciation of Syria's support of the PFLP-GC, it is difficult to understand how the State party can maintain its denial that this relationship will have significant implications for the author and his safety if he is forcibly returned to Syria.

C. The Peace Process

22 During his time working in the office at Al Yarmouk camp, the author began to form his own political views which contradicted the aims and objectives of the PFLP-GC. The

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6 Ibid 4.

8 *Patterns of Global Terrorism – Overview of State-Sponsored Terrorism*, US Department of State dated 21 May 2003 <http://www.state.gov/s/ct/rls/pgtrpt/2003/31644.htm>.

8 Ibid.

9 *Human Rights Watch Report Report 2003: Middle East and Northern Africa: Syria* <http://www.hrw.org/wr2k3/mideast7.html>.

10 See generally: *Human Rights Watch Report 2003: Middle East and Northern Africa: Syria*, *US State Department on Global Terrorism 2003*, David Tal, 'The International Dimension of PFLP-GC Activity' (The Jaffe Center for Strategic Studies, 1990), 'Sponsoring State Terrorism: Syria and the PFLP-GC' 14(9) *Middle East Intelligence Bulletin*. The Middle East Intelligence Bulletin notes specifically that in the Autumn of 1999 and Spring 2000, "Syria began a massive infusion of arms to the PFLP-GC bases in the Beqaa" (at page 5). Further, David Tal's article states that the association between Syria and the PFLP-GC has always been a "fundamental one" stating that Syria apparently endorsed the PFLP-GC's involvement in the 1998 Lockerbie bombing attack. (Page 4).

PFLP-GC is well known for its unequivocal rejection of any kind of political settlement with Israel. As support for the peace process began to gain currency among some sections of the Middle East, the author began to question the radicalness of the group's views and actions.[11] He discussed his doubts with a few trusted fellow members of the PFLP-GC and some of his close relatives.

23 One of the people with whom he discussed his doubts was his colleague, Amjad Salman. Since being detained in Australia the author has learnt that Salman has been arrested and detained by Syrian authorities on suspicion of being an Israeli spy.

D. The Author's Mission to Lebanon and Desertion from the PFLP-GC

24 In March 2000, the author was informed by his superiors that he was being sent on a mission to Lebanon. He was not given any details about the mission as it was a covert operation.[12] From his experience with the PFLP-GC and the information to which he was exposed while working at the office in Al Yarmouk, he was certain that the mission involved terrorist activities and a probable attack against Israel.[13]

25 The author had always known that, as a member of the PFLP-GC, he could be called on at anytime to participate in one of the organisation's missions but the knowledge that he was now being sent to Lebanon to participate in a terrorist attack and his serious doubts about the objectives and actions of the PFLP-GC, weighed heavily on his conscience and acted as the catalyst for him to plan his escape.[14] The author reasoned that it would be easier to escape from the PFLP-GC whilst in Lebanon as the organisation does not have the same presence and control in Lebanon as it has in Syria.[15] The cooperation between Syrian authorities and the PFLP-GC also made the alternative of deserting the PFLP-GC in Syria a more dangerous prospect.[16]

26 When the author arrived in Lebanon he spent three days awaiting further orders from his commanding officer about the upcoming mission. The author believes that five members of the PFLP-GC were picked for the mission and stationed at different sites throughout Lebanon. He said that he did not meet the other members. On his third day in Lebanon he left the PFLP-GC office in Beirut and went into hiding at the Fatah-controlled Palestinian refugee camp, Ein al-Hilweh, in the city of Sydaa.[17] The author kept a low profile at the camp, believing it was the safest place for him to hide from the PFLP-GC. While at the camp he made plans to leave Lebanon and arranged to get false documentation for his travel. He was aware of the danger of returning to Syria and was certain that the PFLP-

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11 RRT Decision [47].

12 RRT Decision [42].

13 See 'Sponsoring State Terrorism: Syria and the PFLP-GC', above n 5, under the heading "Bashar Assad and the PFLP-GC", where is it stated:

> "Meanwhile, as Israel's preparations for a withdrawal were steadily proceeding through the fall of 1999, and **Spring of 2000** Syria began a massive infusion of arms to PFLP-GC bases in Beqaa. The Sultan Yocuab near the border was heavily provisioned in outdated Soviet-built T-55 tanks and other heavy weaponry, while additional surface-to-air missile batteries were position around its perimerter." (Emphasis added).

14 RRT Decision [49].

15 RRT Decision [21].

16 RRT Decision [21].

17 Ein al-Hilweh is reported as the largest refugee camp in Lebanon. For more information on Palestinian Refugees in Lebanon see Dr Nicole Brackman, 'Palestinian Refugees in Lebanon; A New Source of Cross-Border Tension' (The Washington Institute, 1 June 2000).

GC was looking for him, particularly given he had left the mission in Lebanon before its execution.

27 The author made inquiries at the camp about arranging travel documentation and made contact with a man in Lebanon who arranged a false Palestinian Authority passport for him.[18] The author did not know the man and cannot recall his name. Once the author obtained his false passport, he flew almost immediately to Syria to say goodbye to his family.[19] After three days in Syria he flew straight to Bahrain and then to Indonesia using the same false passport for all of the flights.[20] The passport was in the name of Amer Mahmood Hassan and stated that he was born in Lebanon in 1969.

28 Upon arriving in Indonesia the author arranged with a people smuggler to travel to Australia by boat. The author gave the smuggler his false passport after he was told that it was dangerous for him to take it with him to Australia. The smuggler did not warn him that he would be put in detention if he arrived in Australia without travel documentation.[21]

E. Dangers of Desertion

29 The author was well aware of the danger he faced from the PFLP-GC as a deserter. Although the PFLP-GC did not give specific warnings to its members, there was always an imminent threat of punishment if a member demonstrated anything less that absolute loyalty to the organisation's actions and philosophies.

30 The author knew of people who had attempted to leave the PFLP-GC and who had been subsequently hunted down, tortured, imprisoned and even killed. He believes that these executions take place by firing squad most commonly in deserted areas of Lebanon. During his time in the Al Yarmouk office, he heard numerous stories from the leaders of the PFLP-GC about the terrible conditions of the makeshift prisons used by the PFLP-GC. He is aware that one such prison exists in Sabech Bahrat, which is in Abed Street in Damascus.[22] He knew of prisoners in both Syrian and PFLP-GC jails who were imprisoned indefinitely, tortured and burnt with cigarettes and suspended above the ground whilst being subjected to interrogation. The author fears that upon returning to Syria and being detained for illegally exiting he would never be 'released' unless he was dead or left 'totally useless'. This is consistent with reports from the US State Department on Syria (2000) which cites evidence from former prisoners and detainees of torture practices that include pulling out of fingernails, 'the insertion of objects into the rectum, beatings sometimes while the victim is suspended from the ceiling.' [23]

31 When questioned about the basis for his fear of returning to Syria given his desertion from the PFLP-GC, the author has consistently and emphatically pointed to the ongoing relationship between Syrian authorities and the PFLP-GC. The author has consistently maintained that if he is returned to Syria he will imprisoned by the Syrian authorities for

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[18] RRT Decision [23].

[19] RRT Decision [24].

[20] RRT Decision [25].

[21] RRT Decision [70].

[22] RRT Decision [63].

[23] Bureau of Democracy, Human Rights and Labour, *US Department of State Country Report on Human Rights Pratices — 1999*, (23 February 2000). The report also states that most reports of torture come from detainees who are being held at one of the many detention centres run by various security services throughout the country, and particularly while authorities are trying to extract a confession about an alleged crime or alleged accomplices.

leaving the country illegally and once his sentence is served, the Syrian authorities will hand him over to the PFLP-GC.[24] His fear is not only genuine but also supported by the research conducted by his legal team which provides evidence of the relationship and co-operation between the Syrian authorities and the PFLP-GC.

32 There are numerous reports that strongly denounce the treatment of detainees in Syrian and Syrian backed jails. A report by Amnesty International in 2003, into human rights abuses in Syria confirms that torture and ill treatment remain widespread in Syrian jails. The report also notes that more often than not, allegations of such treatment are not investigated. This is supported in correspondence dated 30 January 2005 from Mr Walid Saffour of the Syrian Human Rights Committee ('**SHRC**') based in London.[25] Mr Saffour stated in an email to the author's legal team that, although Syria has endorsed the treaty against torture and cruel and inhuman treatment, methods of torture are still routinely practised in Syria by the Security and Intelligence Authorities.[26] Mr Saffour also noted that '*there is legislation in Syria that exempts security offices and intelligence employees from liability whilst executing their duties*.'[27]

33 Commenting directly on the author's situation, Mr Saffour stated that he is certain 'that if Mr "S" [the author] is repatriated to Syria he will be arrested upon his return, and will be subjected to torture, degrading, cruel and inhuman treatment.' He also noted that the:

> bilateral co-ordination and co-operation between the PFLP-GC and the Syrian Secret Services is an unconcealed issue. PFLP-GC is known for its merciless attitudes towards its opponents.[28]

34 Several reports from SHRC, Amnesty International and Human Rights Watch which provide examples of Syrian exiles who upon return to Syria, have been detained and subjected to cruel and degrading treatment. For example, Nawras Hussein al-Ramadan, a teacher who fled Syria in 1980 was detained upon his return in February 2003 at the Damascus airport. Dr Muhammad Ghazi Hobaieb, a doctor who had been working in Saudi Arabia, was detained after he arrived in Syria; and Moussa Zain al-Abdeen, a teacher who was returning from a twenty year exile in Saudi Arabia was detained at a Syrian border checkpoint in August 2003.[29] At the time of writing, Ramadan continued to be held incommunicado. Dr Hobaeib was released on 14 May 2003, but was ordered to leave Syria within one week and Abdeen was released in late October 2003.[30] None of these people had criminal records and yet they were still detained.

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24 RRT Decision [67].

25 Attached as Annexure B to this Response.

26 Mr Walid Saffour of SHRC < walid@shrc.org > to Kristen Hilton, Manager of the Law Institute of Victoria Legal Assistance Scheme, 30 January 2005, which is attached as Annexure B.

27 Ibid.

28 Ibid.

29 Human rights Watch, *Human Rights Watch Report 2003: Middle East and Northern Africa: Syria* (2003) <http://www.hrw.org/wr2k3/mideast7.html>.

30 Ibid. Further, in 2003 Amnesty International reported the case of Muhammad Sa'id al-Sakhri who was imprisoned for nearly 11 months on charges of belonging to the Muslim Brotherhood Organisation. Muhammad was tortured and ill-treated during his detention and never brought before a court. He was forcibly returned to Syria with his wife and four children on 28 November 2002 following an unsuccessful application for political asylum in Italy. The whole family was arrested upon arrival and Muhammad's wife and four children were also imprisoned for several weeks before being released. ('Syria: Further Information on Forcible Return', *Amnesty International*, 2003) <http://web.amnesty.org/library/engindex>.

35 A recent Amnesty International report dated 13 December 2004, states that a fifty-five year old businessman, Khaled Yaha al-Rai returned voluntarily to Syria in July 2004 from exile in Jordan. Amnesty International confirms that Khaled was arrested on arrival in Syria and since that time has been held incommunicado at various Military Intelligence branches in Damascus. The report states that Khaled was a former member of the Muslim Brotherhood and is liable to be executed for his involvement with the group.[31]

36 The author submits that it is well within reasonable expectation and anticipation that the treatment which would be inflicted on a deserter of the Syrian-supported PFLP-GC — who had sought political asylum in a foreign country — is likely to be equal to, if not more aggravated than, the treatment inflicted on the Muslim Brotherhood member Khaled, who had also sought political asylum.

F. The Author's Arrival in Australia

37 On 11 October 2000, the author arrived in Australia and was placed in immediate detention at Port Hedland Detention Centre in Western Australia.

38 On 16 October 2000, the author was interviewed by an immigration official at the Port Hedland Detention Centre. During this initial interview he told the officer that he had left Syria illegally because he felt socially and politically persecuted. He spoke about the social, economic and employment difficulties facing Palestinians in Syria and told the officer that he did not want to return to Syria. At this interview, the author said that he had been a PLO fighter against Israel in 1986 and 1987.[32] However, he did not tell the official that he had deserted a terrorist organisation in the middle of a mission and that he feared for his life if he was made to return to Syria.

39 In his primary application for a protection visa and his subsequent interview with a DIMIA official on 11 March 2001, the author disclosed information and details about his involvement with the PFLP-GC. He talked about his grave fears of being tortured and even killed if he was forcibly returned to Syria. He said that in his initial interview he was afraid to tell the truth about his involvement with the PFLP-GC. He explained that he was scared that the State party government would not allow him to stay in the country if it knew he had been a member of a terrorist group. He was also concerned that he would not be able to make the official understand that, although he was a member of the PFLP-GC, he had not supported and did not take part in the organisation's terrorist activities. He was further concerned that the State party government would alert the PFLP-GC of his whereabouts, as he knew his own government would if the situation were reversed.

40 Many Syrians are deeply distrustful of their Government. The author says that people in Syria, especially Palestinians, are careful about what they say and who they criticise. Disclosures about, or oppositions to the authorities are moderated by the knowledge of what can happen if one challenges the authority of the ruling party. The author reiterated to his legal team that many people fear the Syrian Government particularly because of its links to terrorist groups.[33]

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[31] 'Syria: Fear of Death Penalty', Amnesty International, 13 December 2004 <http://web.amnesty.org/library/engindex>.

[32] RRT Decision [12].

[33] See generally *Syria - Country Reports of Human Rights Practices*, US Department of State (1999) <http://www.state.gov/g/drl/rls/hrrpt/1999/427.htm>. The report confirms that the Syrian Government does not tolerate political opposition and has outlawed the existence of human rights groups.

G. The Alleged Israeli Spy

41 On 27 June 2001, the author's first application for a protection visa was rejected by the Delegate. At around this time the author made contact with his family and was told that Amjad Salman, a fellow member of the PFLP-GC, had been arrested by the Syrian International Security Organisation ('**SISO**') under suspicion of being an Israeli spy.[34]

42 The author had worked with the alleged spy at the PFLP-GC office in Al Yarmouk and had also associated with him outside of work. After the alleged Israeli spy was arrested, SISO went to the author's family home and ordered his younger brother to come to its offices in central Damascus for interrogation about the author's disappearance and his connection with the alleged Israeli spy. The author is convinced that the PFLP-GC must have notified SISO of his disappearance in Lebanon. The author's brother was detained at SISO headquarters for two days. He was questioned as to his brother's whereabouts and political beliefs.[35] Since the initial questioning, the author's brother and other family members have been interrogated on many other occasions. Asked whether his brother had ever refused to undergo questioning by SISO, the author replied: 'would you dare?'[36]

43 The author's family have been reluctant to give him any specific details about the questions they were asked by SISO when speaking to him on the telephone, as they are concerned that their telephone may be tapped.[37] They are also aware that the author's telephone conversations can be overheard at the detention centre in Australia. His family have been adamant, however, that he must not return to Syria and have at different stages asked him to limit his contact with them, for fear that their association with him will place them in danger with SISO and Syrian authorities.[38]

44 Members of the PFLP-GC have also attended the author's family house and have asked questions regarding his whereabouts. The author's family told the author that during questioning by the PFLP-GC, they said that the author had gone to Lebanon and that they had not heard from him for some time. The author's family were also asked about his relationship with the accused Israeli spy.

45 The author did not know the accused Israeli spy very well, and never suspected that he was a spy. He is very concerned that SISO and the PFLP–GC believe that he was closer to the accused spy than he actually was, and as a result, may suspect him of having passed on information about the PFLP-GC which he obtained through his work at the Al Yarmouk office. Of even greater concern is that the SISO and PFLP-GC may believe that he is also a spy and will incorrectly surmise this that is the reason why he left the PFLP-GC mission in Lebanon. The author is aware that if he is suspected of collaborating with

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[34] RRT Decision [68].

[35] RRT Decision [72].

[36] The US Department of State Report 1999 (ibid) notes that the Emergency Law in Syria authorises security services to enter homes and conduct searches if security matters (which are very broadly defined) are involved. The report noted that the 'government has apparently continued its practice of threatening detainees or their relatives in order to obtain confessions or the fugitive's surrender.'

[37] The US Department of State Report 1999 also states that the Syrian Security Services selectively monitor telephone conversations and facsimile mail. It is also reported that they open mail destined for citizens and foreign residents.

[38] RRT Decision [72–3].

an accused Israeli spy or of being a spy himself, he will most certainly be imprisoned, tortured and possibly executed if he is returned to Syria.[39]

46 Again, in these circumstances, it is well within reasonable expectation and anticipation that the Syrian authorities and PFLP-GC may, in view of the author's relationship with the Israeli spy, and suspicions that the author himself is an Israeli spy, particularly in view of his desertion from the PFLP-GC at a time when he had been commanded to go into Lebanon presumably to engage in terrorist attacks against Israeli forces, inflict on the author torture, punishment and mistreatment which is even more aggravated than was inflicted on Khaled.

[39] RRT Decision [73].

PART 3. ADMISSIBILITY

A. Two key issues regarding admissibility

47 In relation to any communication made by an individual regarding a State party to the Covenant in accordance with article 1 of the Optional Protocol, the Committee must determine the admissibility of that communication under:

(a) Articles 2, 3 and 5(2) of the Optional Protocol; and

(b) Rules 93 and 96 of the Committee's Rules of Procedure.

48 The Australian Government has challenged the admissibility of the author's Communication in relation to the alleged breaches of article 7 and articles 9(1) and (4), and submits that the alleged breaches are inadmissible for two reasons:

(a) under article 5(2)(b) and Rule 96(f) in relation to all allegations, because the author has failed to exhaust all available and effective domestic remedies; and

(b) under Rule 96(b) in relation to article 7 allegations, because the author has failed to sufficiently substantiate those allegations.

49 The author submits that the alleged breaches are admissible because:

(a) for the reasons set out in Part 3B below, the author has exhausted all available and effective remedies available to him in Australia; and

(b) for the reasons set out in Part 3C below, the allegations in relation to article 7 have been sufficiently substantiated.

50 For the purposes of the Committee's consideration of the admissibility of the Communication, the author:

(a) confirms that:

(i) in relation to Rule 96(a), his identity has been disclosed to the Committee, and that he is still within the territory of the State party; and

(ii) in relation to Rule 96(e), this matter is not being considered by any other procedure of international investigation or settlement; and

(b) further respectfully submits that:

(i) in relation to Rule 96(c), the communication is not an abuse of the right of submission; and

(ii) in relation to Rule 96(d), the communication is not inconsistent with the provisions of the Covenant.

B. Failure to exhaust domestic remedies — all allegations

(i) Author's preliminary observations concerning judicial review of detention in Australia

51 The author notes that very limited remedies are available to persons detained by the State party under the *Migration Act*. This is the direct result of a consistent and sustained policy by the State party over a number of years to drastically scale back the remedies available to detained persons, and the scope of judicial and other review available in relation to administrative decisions made under the *Migration Act*.

52 This policy has been noted by commentators including Justice Ronald Sackville of the Federal Court:[40]

> Parliament has responded to the perceived generosity of the courts by enacting legislation designed to curtail the opportunities for and the scope of judicial review of migration decisions, thereby raising important constitutional questions. For example, Part 8 of the *Migration Act*, enacted in 1994,[41] deprived the Federal Court of jurisdiction to grant relief on certain grounds that otherwise would constitute jurisdictional error on the part of the decision-maker. The legislative scheme was upheld by a narrow majority of the High Court on the ground that Parliament has power, pursuant to s 77(i) of the *Constitution*,[42] to vest jurisdiction in a federal court over part only of a controversy. More recently, Parliament's attempt to confine judicial review of migration decisions by a means of a privative clause survived a constitutional challenge, but at the price of a very narrow reading of the provision.[43] (Footnotes are in the original).

53 Justice Sackville notes what he sees as 'the reliance by Parliament on repeated legislative amendments to overturn unwelcome judicial decisions or to curtail the scope of judicial review', [44] particularly in the context of Australia migration law, in relation to which he has observed:

> Successive [Australian] governments have either enacted, or proposed, legislation designed to curtail the power of the courts to override the determinations of administrative decision-makers, including bodies such as the Refugee Review Tribunal and the Migration Review Tribunal.[45]

54 For example, in the second reading speech before the Senate in relation to the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth), the Parliamentary Secretary for the Minister for Immigration and Multicultural Affairs noted that the purpose of the bill was:

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[40] Justice R Sackville, 'Refugee Law: the Shifting Balance', (Paper presented at the Judicial Conference of Australia - Colloquium 2003, Darwin, 30 May–1 June 2003) <http://www.jca.asn.au/pubs/sackville03.doc> 3.

[41] Part 8 was introduced by the *Migration Reform Act 1992* (Cth) which took effect on 1 September 1994.

[42] *Abebe v Commonwealth* (1999) 197 CLR 510. The result, until the repeal of Part 8 in 2001 (by the *Migration Legislation Amendment (Judicial) Review Act 2001* (Cth)), was a "bifurcated" jurisdiction in migration matters, divided between the High Court and Federal Court.

[43] *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24.

[44] Sackville, above n 40, 5.

[45] The Hon Ronald Sackville, 'Judicial Review of Migration Decisions: An Institution in Peril?' (2000) 23(3) *UNSWLJ* 190, 190.

> to give legislative effect to the government's election commitment to reintroduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances. This commitment was made in the light of the extensive merits review rights in the migration legislation and concerns about the growing cost and incidence and the associated delays in removal of non-citizens with no right to remain in Australia.[46]

55 The Explanatory Memorandum accompanying the Bill made it clear that its intended effect in introducing the privative clause in section 474 of the *Migration Act* was to limit the scope of judicial review and:

> provide decision-makers with wider lawful operation for the operation of their decisions, such that, provided the decision-maker is acting in good faith, has been given authority to make the decision concerned (for example, by delegation of the power of the Minister or by holding a particular office) and does not exceed constitutional limits, the decision will be lawful.[47]

The only other policy objective stated in the Explanatory Memorandum was, under the heading "Financial Impact Statement", that the changes will:

> if [the privative clauses] operate as predicted by reducing the issues to be addressed and allowing cases to be resolved more quickly, deliver substantial savings.[48]

56 The author notes that this cost-saving imperative has been justified by members of the Australian Government on a utilitarian basis. In an address a few months before the bill was introduced, the then Minister for Immigration and Multicultural Affairs, Philip Ruddock said:[49]

> … [M]igration decision-making is integral to the whole migration program. As Minister, I am determined to ensure that the decision-making process is effective, efficient in terms of cost, time and quality of outcomes. The planned changes to judicial review to narrow its operation are an important part of achieving this goal. They are part of a wide range of measures in place, or to be put in place, to ensure that the government has effective management and control over migration in Australia.
>
> In my view, the challenge to the system of administrative law, and its practitioners, is to not simply focus on particular aspects of the system — such as whether there is "full" judicial review of decisions available, whether the ADJR Act applies to decisions, and minor technical matters of this nature — but on the wider system of which they are a part.
>
> There must be an ongoing process of properly balancing the interests of individuals with the interests of the wider community, and it is the government's

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46 Commonwealth of Australia, *Parliamentary Debates*, Senate, 2 December 1998, 1025 (Senator Kay Paterson).

47 Explanatory Memorandum, Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth) [16].

48 Ibid [4].

49 The Hon Philip Ruddock, 'Narrowing of Judicial Review in the Migration Context' (December 1997) 15 AIAL Forum 13, 20.

> opinion that the planned changes to judicial review of migration decision-making achieve that goal.

57 The utilitarian and cost-saving rationale informing this policy of limiting judicial review in migration matters is inconsistent with the fundamental guarantees in a human rights instrument which guarantees individual freedoms. The author notes that a statement which describes proper judicial review of an individual's detention as a 'minor technical matter' shows a complete lack of regard for the provisions of the Covenant, particularly article 9(4).

58 Further submissions in relation to judicial review in Australia are set out in Part 4D.

(ii) The author has exhausted all available and effective domestic remedies

59 The State party has submitted that the following domestic remedies are available to the author in the High Court:[50]

(a) **Remedy 1** — a declaration that the decision of the RRT be set aside and that the Minister intervene in his case and substitute a more favourable decision; and

(b) **Remedy 2** — an order of *habeas corpus*.

60 The State party has further submitted that if the author is successful in these proceedings:

> a process would be initiated that may result in Mr Taha being granted a visa and released into the community. This would provide an effective remedy for the alleged potential breach of article 7.[51]

61 In preparing this Response, the author's representatives sought advice from Australian counsel that the author has exhausted all domestic remedies available to him which would be effective in relation to the violations and potential violations alleged in the Communication. That advice is set out in the Memorandum of Advice attached to this Response as Annexure A. For the reasons set out in Counsel's Memorandum of Advice, the author respectfully submits that he has exhausted all available and effective remedies.

C. Failure to sufficiently substantiate allegations — article 7

62 Rule 96(b) requires that claims of alleged violations of Covenant rights must be made "in a manner sufficiently substantiated".

63 In the 19th Annual Report of the Human Rights Committee,[52] the Committee stated:

> Although an author does not need to prove the alleged violation at the admissibility stage, he must submit sufficient evidence substantiating his allegation for purposes of admissibility. A 'claim' is, therefore, not just an allegation, but an allegation supported by a certain amount of substantiating evidence.

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[50] State party's Submission [23–-6], [62–-5] and [91–-3].

[51] Ibid [27].

[52] Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40) (3 October 1995) [500].

64 Consistent with this approach, the author submits that evidence presented by the author at the admissibility stage must be of a type necessary to establish a violation of a right protected by the Covenant. The evidence must be directed towards proving each of the component elements required of a violation of that right.

65 The author submits that the requirement to provide 'sufficient evidence' of a claim should be considered in the light of a claimant's particular circumstances. In the author's case, the relevant circumstances include:

(a) that he arrived in Australia seeking asylum with no documents;

(b) he did not speak English;

(c) he did not know what he had to prove in order to claim asylum;

(d) the nature of his claim required him to gather information concerning a secretive state (Syria), but he was held within a detention facility with no means of undertaking that task; and

(e) the relevant provisions of Australian law provide that he was entitled to obtain legal representation and advice, but only if he knew that he had to specifically request it,[53] and in the absence of such advice being provided to him before his initial interview, he would have had no means of knowing of that requirement.

66 The State party has also challenged aspects of the author's claim due to his perceived lack of credibility. The author submits that these assessments as to credibility were unreasonably reached by the State party's domestic tribunals, and should be disregarded by the Committee. However, this issue is properly to be considered in the context of the merits of the author's application. The author's submissions in relation to his credibility, and the extent to which the Committee should accept the findings of fact from the State party's domestic tribunals, appear in Part 4A of this Reponse.

67 In relation to article 7 of the Covenant, the author alleges that it is a reasonably foreseeable result of his removal to Syria that he would be subjected to cruel, inhuman and degrading treatment at the hands of the PFLP-GC, and that the State party is hence under an obligation of *non-refoulement* in relation to the author. For that claim to be admissible, the author must present sufficient evidence to show that it would be a reasonably foreseeable consequence of his removal from Australia to Syria that he would be subjected to that punishment or treatment. This requires the author to present evidence regarding:

(a) the nature of the treatment or punishment he fears he would be subjected to were he to be removed to Syria, to show that it falls within the categories of treatment or punishment prohibited by article 7; and

(b) the reasons why it is reasonably foreseeable that he would be subjected to such treatment were he to be removed to Syria.

68 The Australian Government has challenged the admissibility of the author's allegations for failure to sufficiently substantiate claims on the following grounds:

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[53] Section 263 of the *Migration Act* provides that applicants for refugee status must be provided with legal representation; but s 193 provides that unlawful boat entrants must specifically request legal representation.

(a) The Communication provides no evidence that the author left Syria illegally, or that Syria generally detains persons who have left Syria illegally on their return.[54]

(b) The author has not provided evidence that the PFLP-GC detains people or subjects them to treatment or punishment prohibited by article 7.[55]

(c) The Communication provides no evidence of a practice of cooperation between Syrian authorities and Palestinian groups regarding detention, or between Syrian authorities and the PFLP-GC in particular.[56]

(d) The evidence provided by the author does not establish that the author is personally at risk of treatment or punishment prohibited by article 7.[57]

(e) The Communication provides no evidence to support the claim that the fact that author's brother was picked up for questioning, or any explanation as to why the author is as a result in any greater risk of torture, mistreatment or punishment.[58]

69 Specifically, in relation to the grounds set out in sub-paragraphs (a), (b), and (c), and as each of those three grounds affect the ground contained in (d), the author contends that the State party's reliance on the author's failure to substantiate those grounds is disingenuous by reason of:

(a) the author's circumstances upon his arrival in Australia (without possessions, documents, travel or other identity papers, etc);

(b) the author's continued detention over 4 years in detention centres, with no access to, or opportunity to obtain, evidentiary material to support his claims; and

(c) importantly, the State party's unreasonable stance in requiring the author to prove notorious facts, and its continuing failure to acknowledge those notorious facts which inform the grounds set out in sub-paragraphs (a), (b), (c) and (d).

70 The author fears that the events described in the following paragraphs will occur if he is removed to Syria, and submits that, based on the evidence provided in the Communication and this Response, his claim in relation to article 7 has been made in a manner sufficiently substantiated for the purposes of admissibility under Rule 96(b) of the Rules of Procedure.

(i) The author left Syria illegally

71 The author left Syria illegally using a false passport.[59]

72 In both the Delegate's Decision and the RRT Decision, the author has provided consistent and detailed evidence concerning:[60]

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54 State party's Submission [33].

55 Ibid [38].

56 Ibid [36-7].

57 Ibid [34].

58 Ibid [39].

59 Communication, Part 5 [12(c)].

60 Delegate's Decision, Part C section 5.3; RRT Decision [6], [23–-5].

(a) the manner in which he obtained a false passport;

(b) the name 'Amer Mahmood Hassan', which he used on his false passport;

(c) his movements from the time he left Lebanon until the time he arrived in Australia; and

(d) how he disposed of the passport before he arrived in Australia and the reasons he disposed of it.

Those decisions were annexed to the Communication submitted to the Committee by the author as Annexures B and C respectively.

73 Although both the Delegate and the RRT Member did not accept that the author left Syria illegally, this was not because the author failed to provide any evidence of his illegal departure, but because neither the Delegate nor the RRT accepted that the author was a credible witness. Indeed, the only evidence which was before the Delegate and the Member was that of the author, in which he stated that he departed Syria illegally. Issues surrounding the author's credibility, and the weight the Committee should accord to findings of fact by the Delegate and the Member, is addressed in Part 4A of this Response.

74 Further, the State party has only questioned the author's credibility. It has not provided any evidence as to why it is satisfied that the author did not leave Syria illegally. It is possible for the State party to seek to verify the author's claim, for example by requesting confirmation from Syria that a person travelling under a Palestinian Authority passport carrying the name the name "Amer Mahmood Hassan" left Syria by plane at the time the author has stated he did. The State party has not done this. Certainly, similar recourse is not available to the author.

75 As a result, the author respectfully submits that his claim that he left Syria illegally is sufficiently substantiated for the purposes of admissibility.

(ii) Detention on return to Syria

76 The author fears he will be initially detained by Syrian authorities on his arrival in Syria because he left Syria illegally using a false passport.[61]

77 Based on statements from the Australian Department of Foreign Affairs and Trade, the Delegate and the RRT *decision-maker* accepted that people who left Syria illegally are usually detained on return for a period of up to three months and questioned by Syrian intelligence officers.[62] Those decisions clearly accept that, if the author had in fact left Syria illegally, that he would face detention by Syrian authorities for up to three months.

78 In these circumstances, and given the inclusion of both decisions in the Communication, it is disingenuous for the State party to challenge admissibility on the basis that the author has not sufficiently substantiated his claim that he will be detained if he is removed to Syria. The author respectfully submits that this claim has been sufficiently substantiated for the purposes of admissibility.

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[61] Communication, Part 5 [12(d)].

[62] Delegate's Decision, Part C section 5.4; RRT Decision [118].

(iii) Co-operation between Syrian authorities and the PFLP-GC will result in the author being subjected to torture, mistreatment or punishment which is prohibited by article 7

79 The State party has disputed the chain of events described by the author by challenging each as a separate factor, capable of being assessed in isolation. However, the events feared by the author need to be understood and assessed as a single course of events — which together constitute the author's fear of a potential violation of article 7 — which will flow from his inevitable detention by Syrian authorities if he is returned to Syria. These events are interdependent and indivisible, and together constitute what he fears. The author therefore submits, both in relation to admissibility and merits (as discussed in Part 4B below) that his story needs to be assessed in relation to the feared course of events in their entirety, and not assessed in isolation as has been done by the State party.

80 As a direct consequence of his detention on return to Syria, the communication networks which exist between Syrian authorities and the PFLP-GC will alert the PFLP-GC to the fact that the author is back in Syria.

81 It is highly likely that the PFLP-GC will locate the author because:

(a) he would be forced to return to live with his family;

(b) his family lives in a Palestinian refugee camp which is administered by UNRWA,[63] but which politically is under the influence of the PFLP-GC;

(c) he will be recognised and his presence will be notified by informers to the PFLP-GC leadership, who will locate him and detain him.

Due to co-operation between Syrian authorities and the PFLP-GC, the author will either be handed over by Syrian authorities to the PFLP-GC,[64] or the Syrian authorities will inform the PFLP-GC that he is in Syria. Further, there is clear international recognition that Syrian authorities have co-operated and continue to co-operate with the PFLP-GC and provide financial and other support to PFLP-GC activities.

82 'Deserters' of the PFLP-GC are punished by the PFLP-GC leadership,[65] and it is certain that because he abandoned his mission in Lebanon, the author faces punishment at the hands of the PFLP-GC. As a precursor to punishment, the PFLP-GC will detain the author either in cells located in places in Damascus, or in cells used by the PFLP-GC in remote regions of Lebanon.

83 The author fears that, given the PFLP-GC's stated refusal to abandon armed struggle, there is an increased likelihood in the current increasing disposition of many moderate Palestinian groups towards peace that the PFLP-GC would wish to make an example of him to other potential deserters. The extent of punishment at the hands of the PFLP-GC depends on:

(a) the extent to which they decide to make an example of him as a 'deserter';

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63 RRT decision [71].

64 Communication, Part 5 [12(d)].

65 See above [30–32].

(b) the seriousness of the risk they see the author poses in terms of the information he was privy to during the time he worked in the PFLP-GC office; and

(c) how seriously the PFLP-GC regards his alleged connection with an alleged Israeli spy the significance of which is demonstrated by the fact that both the PFLP-GC and SISO have questioned members of the author's family concerning his whereabouts, following the arrest of the alleged Israeli spy.

84 The author has submitted that the torture, mistreatment or punishment he fears will involve some or all of the following acts, all of which fall within the scope of prohibited treatment or punishment under article 7:

(a) solitary confinement for extended periods;

(b) being suspended in the air for extended periods in painful positions;

(c) being burned with cigarettes during interrogation;

(d) possible execution by a firing squad and burial in the desert in Lebanon.

85 The author submits that if made out at the merits stage, these claims would support his allegation of a potential violation of the State party's obligations under article 7. On that basis, the author respectfully submits that these claims have been sufficiently substantiated for the purposes of establishing the admissibility of the alleged potential violation of article 7.

D. Conclusion in relation to admissibility

86 For the reasons set out in Part 3B and 3C, and in Counsel's Memorandum of Advice, the author respectfully requests the Committee to determine that the claims in relation to articles 7, 9(1) and 9(4) are admissible.

PART 4. MERITS

A. The State party's assessment of the author's credibility was unreasonable

87 The author notes the State party's Submission that:[66]

> due weight must be accorded to findings of fact made by domestic, judicial or competent government authorities unless it can be demonstrated that such findings are arbitrary or unreasonable.

While the author accepts that the Committee will usually give considerable weight to the findings of fact by domestic judicial and administrative bodies, the Committee is also able to draw its own conclusions. As stated in the Communication, the Committee is not bound by such findings and is entitled to freely assess those facts based on the full set of circumstances in every case.[67]

88 The author submits that, because of the manner in which he was treated on arrival in Australia, the manner in which his interviews were conducted and in the absence of any guidance or advice being provided to him by a person he could trust, he was initially reluctant and fearful to tell his story, and remained uninformed throughout the entire process as to how he ought to conduct himself in immigration control interviews.

89 Based on these factors, and the instances of unacceptable questioning techniques used and inappropriate inferences drawn in the decisions discussed below, the author submits that the findings in the Delegate's Decision and the RRT Decision concerning the author's credibility are unreasonable, and should be disregarded by the Committee.

(i) The effect of immigration detention and the author's personal background on his responses to questions

90 The author arrived in Australia after fleeing a terrorist organisation that is responsible for some of the most merciless terrorist attacks in recent history. He sought sanctuary in Australia and was instead immediately placed in isolated detention, the conditions of which have been vigorously condemned by HREOC.[68] The author did not anticipate the isolation and confusion that he has been forced to endure in unmistakably prison-like conditions in Australia.

91 Upon arrival in Australia he had no knowledge of its political climate, or of his interrogator's knowledge of Syrian politics or Syria's affiliation with terrorist organisations. He received no outward indicators that he was not in a threatening environment, in which he would not be subjected to duress and in which he would be free to tell his story openly and without recrimination. General evidence of Syria's poor human rights record provided in the author's Communication was not challenged by the Australian Government. This record includes over 40 years of operation of emergency laws giving unlimited powers to security forces; the absence of the rule of law and its

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66 State party's Submission [45], citing the decision of the Committee Against Torture in *AK v Australia* Communication No. 148/1999 [6.4].

67 Communication, Part 6 [5].

68 For criticism of the prolonged detention and the conditions of detention in Australian detention centres see generally: *Report on Visits to Immigration Detention Facilities*, Human Rights Commissioner (2001), and *A Last Resort – HREOC Report of National Inquiry into Children in Detention* (13 May 2004).

replacement with martial law; the arbitrary detention of citizens and foreigners, at any time and from any location; 'huge numbers' of people harassed and detainees treated badly both physically and psychologically; that torture and maltreatment is common practice in all detention centres and prisons; that detention facilities are decentralized and supervised by the various security forces; and that detention facilities have deliberately been 'severely depleted' in order to increase the suffering of detainees.[69] This background context must be kept in mind when evaluating the author's credibility and his participation in questioning processes in relation to his refugee application.

92 The author's answers before both the Delegate and the Member were shaped by an assumption that his interrogator had some understanding of the situation in Syria, its questionable rule of law, years of explosive involvement with other Arab and Western states, disregard for basic human rights which in countries such as Australia are often taken for granted and the ruthless collective mindset of the PFLP-GC. As a result, the author made statements that often assumed and relied upon a level of background knowledge which the relevant decision-maker did not possess. The decision-maker misconstrued this as an inability to provide detailed evidence. The author did not understand this problem or the significant impact it would have on his refugee application, as that problem was never adequately explained to him.

(ii) The context in which immigration control interviews are conducted

93 Immigration interviews rarely take place in non-threatening environments. Issues of personal security, ethno-linguistic characteristics and cultural differences are rarely fully considered, nor are measures taken to set refugee-status applicants at ease, or give them confidence that they are safe and can speak openly.

94 All of the interviews which have been conducted between the author and immigration officials have been conducted via an interpreter.[70] The problematic issues with interpretation have been well recognised by Australian courts particularly in refugee matters.[71] Problems of direct communication are exacerbated when, as in the author's case, critical hearings are held using media such as videolinks,[72] which are a disjointed and frustrating medium even for people with considerable experience in using them.

95 Until recently, he did not have the benefit of legal advice and even now, as he is being assisted by a legal team to make this Communication to the Committee, he is unable to give his instructions in person. He has had to tell his story through a number of different interpreters, without privacy and through faulty telephone lines and has been frustrated by the fact that he is repeatedly asked the same questions without having any real appreciation of how his answers have and will impact on his future. There have been times during the author's communication with his legal team when he has sounded

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[69] Communication, Part 6 [9].

[70] The 2001 *Report on Visits to Immigration Detention Facilities* by the Human Rights Commissioner notes that at the time of inspection of Australian dentention centres there was an "uneven use of interpreters" (at page 24). It also states that at the time there were no on-site interpreters at the Port Hedland facility, where the author was detained. The report is also critical of DIMIA's failure to ensure that immigration detainees understand the reasons for their detention," their rights in connection with detention, including the right to legal assistance and advice and to the services of an interpreter when needed" (at page 28).

[71] See *Perera v MIMIA* [1999] FCA 507; *WACO v MIMIA* [2003] FCAFC 171; *WAIZ v Minister for Immigration and Multicultural Affairs* [2002] FCA 1375 which discuss the difficulties faced by applicants requiring the use of interpreters to give their evidence to the courts.

[72] The author's RRT hearing was held by videolink: RRT Decision [27].

incredulous as to the nature of the question being asked. For instance, questions such as, 'why are you afraid to return to Syria?' and 'what will the Syrian Government and the PFLP-GC do to you if you return?' appear to the author as self-explanatory.

(iii) The Delegate's Decision

96 The Delegate was not satisfied that the author left Syria illegally, and did not find the author credible because his stories were inconsistent.[73] The evidence given by the author at his original interview on 16 October 2000, four to five days after his arrival on the coast of Western Australia, at which he did not mention his involvement with the PFLP-GC, was preferred to the evidence he gave subsequently in his written application on 14 February 2001 and the interview with the Delegate on 11 March 2001, at which he disclosed this connection and the fate he feared were he to be returned to Syria.

97 The Delegate did not believe the author had left Syria illegally despite the fact that he was:

> consistent in his claim that he used a (sic) he illegally departed from Lebanon to travel to Australia on a Lebanese issued Palestinian travel document in the name of Aamer Mahmoud Hasan.[74]

The Delegate used the alleged "inconsistencies" in his story to doubt the consistent aspects of it, but offers no reason for preferring the first testimony over the latter disclosure of the PFLP-GC aspect of the story other than her view that it was "extremely unlikely" that the author would not raise the true reason for his flight and desire for asylum at the entry interview. For the contextual reasons described above, this was an unreasonable conclusion to draw.

98 The Delegate states that the author was informed at his entry interview that:

> he was expected to give true and correct answers to the questions and that if the information he gave at any future interview was different to what he said now, this could raise doubts about the reliability of what he said, [75]

and later stated she was:

> satisfied that the [author's] responses at his entry interview show that he understood the questions he was asked and that he knew the importance of providing accurate information.[76]

99 However, the Delegate provides no reasons as to why she was satisfied that the author in fact had a state of mind which indicated that he understood the questions he was asked and that he knew the importance of providing accurate information. The Delegate does not indicate any qualities which attach to the author's responses at the entry interview which would indicate such an understanding. This can be contrasted with the qualities — 'vague and unconvincing' or 'evasive and unconvincing' — ascribed to the author's claims which were made subsequently. The reasons stated by the Delegate do not support

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73 Delegate's Decision, Part C section 5.3.

74 Ibid.

75 Ibid.

76 Ibid.

the conclusions drawn in relation to credibility. (Curiously, this view can be contrasted with that of the RRT Decision-maker, who due to his view that the author is a well-trained and experienced soldier, did not accept that the author had *not* been involved in operations for the PFLP-GC.)

100 The Delegate's views seem particularly unreasonable when it is recalled that the author had only arrived in Australia on a smuggler's boat four to five days before the interview, and on arrival in Australia had been immediately detained in the Port Hedland detention centre. As a result, it is entirely to be expected that the author would feel scared.[77]

101 Given the author's claimed history, and the vulnerable state he was in immediately after his arrival in Australia, the Delegate should have:

(a) taken more comprehensive steps to satisfy herself that the author was fully aware of and informed about the situation he was in and the visa application process; and

(b) set out the reasons why she was satisfied that the evidence given by the author at the entry interview was more credible, and less vague and more convincing, than the evidence provided subsequently.

However, the Delegate failed to do so. In the circumstances, therefore, the author respectfully submits that the Delegate's decision that the author's claim that he left Syria illegally lacked credibility was unreasonable, and should be disregarded by the Committee.

(iv) The RRT Decision

102 A review of the RRT Decision reveals an approach by the Member that is alarmingly adversarial and negatively pitched. In finding that the author's claim that he left Syria illegally was not credible, the Member stated: [78]

> I am not satisfied that the Applicant *had any reason to seek to depart illegally* and despite his account of assistance in obtaining his travel document and the involvement of a smuggler, I am not satisfied he did depart illegally. (Emphasis added).

103 The author submits that in effect the Member took an unreasonable view that the author did not leave Syria illegally, because the Member:

(a) in the place of the author's subjective assessment of the political situation at the time the author decided to abandon the PFLP-GC mission, substituted his own perceptions and knowledge and determined the likelihood of the author's claims based on what the Member considered his own decision would have been in the circumstances;

(b) fails to give due weight to the Delegate's initial assessment of the author's account of how he travelled from Lebanon to Australia, and discounts the consistency of the author's account in favour of that replacement assessment of the existing political climate by the Member; and

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77 RRT Decision [62].

78 Ibid [116].

(c) fails to consider and take into account the significance of the author's emotional or psychological state, or his political beliefs, in the making of his decision to flee.

104 Whether the author had any reason to leave Syria illegally is a separate question from whether or not he did in fact leave Syria illegally. The author submits that he decided to leave and did leave Syria illegally. The fact that the Member, with the information available to him and without the political, emotional and psychological pressures to which the author was subject, would not have done so is irrelevant.

105 Secondly, the Member's cross-examination style of interview was wholly inappropriate, and manipulated the author's responses to his detriment. This is particularly the case in the line of questioning in paragraphs RRT Decision 46–52, in which the RRT Member appears to be of the view that it is not credible that a person with military training would desert a mission unless they were physically unsound or afraid or scared, and put that view to the author. The Member found that this fear was at odds with the steely courage and fearlessness that he believed would befit a soldier who had been militarily trained. The Member also stated that he found it difficult to believe that a person who had been a member of a terrorist group would have the capacity to change his views about the activities of that group and as a result decide to desert the organisation. Further, in doing so, the Member failed to take into account the author's previous sedentary role in the PFLP-GC as a clerk in the office not accustomed to active combat.

106 It could be construed that the RRT Member was inviting the author to admit that he had simply failed to carry out a terrorist mission through cowardice. This interpretation was incompatible with the author's consistent account that he abandoned his mission in Lebanon because he supported the current peace initiatives for political reasons, and did not want to participate in any acts of violence which could potentially jeopardise those initiatives. Further, and given permissible exclusions in the consideration of refugee applications in relation to known or suspected terrorists, the RRT Member was essentially inviting the author to compromise his own visa application.

107 It is difficult to understand why the Tribunal doubted the author's evidence, or to accept that the Tribunal has not come across stories of soldiers deserting before, and does not admit even of the possibility of such an occurrence. It is both logical and consistent with the author's fears that he would be reluctant and fearful of informing the State party's authorities of his previous involvement with a notorious terrorist organisation, despite the fact that he never engaged in any terrorist activities.

(v) The findings regarding credibility are unreasonable

108 In his Communication, the author explained that he did not make the claims about the PFLP-GC at the interview, which took place 5 days after his arrival, because he was 'scared to tell his story and did not know who to trust'.[79] He also made the point that his story has remained consistent ever since that first interview. The Committee Against Torture (**CAT**) has found that it is not unusual to find contradictions and inconsistencies in an author's story, particularly if they have been subject to or threatened with torture.

[79] Communication, Part 6 [6].

According to the CAT, 'complete accuracy is seldom to be expected by victims of torture and … may not raise doubts about the general veracity of the author's claims'.[80]

109 Although the author is not claiming to be a victim of torture, his experience of the brutality and lawlessness of the PFLP-GC, with the support of the Syrian authorities who are themselves known for widespread human rights abuses and flagrant disregard for civil liberties, more than accounts for his reluctance to trust Australian Government officials who have enormous power over him as a result of his detention.

110 Against this background, and due to the factors set out above and the comments in relation to the findings of both the Delegate and the Member, the author submits that the negative assessments of his credibility by the Delegate and the Member were reached unreasonably, and the Committee should form its own views in relation to the evidence presented by the author.

B. Australia would violate article 7 if it removed the author to Syria

111 The obligation assumed by the State party under article 7 is to protect the dignity and mental and physical integrity of the individual by ensuring protection from torture and cruel, inhuman or degrading treatment or punishment.[81] All individuals within Australia's territory and subject to its jurisdiction must be protected from article 7 violations,[82] including aliens,[83] irrespective of their nationality or statelessness.[84] Article 7 also imposes a non-derogable obligation of *non-refoulement* on States parties.[85] They *must* not expose individuals to torture, or cruel inhuman or degrading treatment or punishment upon return to another country by way of extradition, deportation, expulsion, *refoulement* or any other form of removal.[86]

(i) The Committee has previously employed two differing tests

112 The Committee has taken a number of different approaches to the degree of risk that must be established in order for the obligation of *non-refoulement* to arise.

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80 *Alan v Switzerland* Communication No 21/1995 [11.3]. See also *Tala v Sweden* Communication No. 43/1996 [10.3].

81 Human Rights Committee, General Comment 20, 'Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7)' [2] (Forty-fourth session, 1992) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev 6 at 151 (2003).

82 *International Covenant on Civil and Political Rights*, 999 UNTS. 171, article 2(1) (entered into force 23 March 1976).

83 Human Rights Committee, General Comment 15, 'The position of aliens under the Covenant' [7] (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 6 at 140 (2003).

84 Ibid [1].

85 Human Rights Committee, General Comment 20, 'Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7)' [9] (Forty-fourth session, 1992) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev 6 at 151 (2003).

86 Ibid; Human Rights Committee, General Comment 31, 'Nature of the General Legal Obligation on States Parties to the Covenant' [12] (Eightieth Session, 2004) UN Doc CCPR/C/21/Rev 1/Add.13 (2004).

(a) 'Real risk'

113 In General Comment 31, the Committee took the view that the obligation not to extradite, deport, expel or otherwise remove a person from the territory of a State party arose where there are 'substantial grounds for believing there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant'.[87]

(b) 'Necessary and foreseeable consequences'

114 In *Ng v Canada*, the Committee equated the requirement of a 'real risk' with a 'necessary and foreseeable consequence'.[88] The Committee also suggested in Ng's case that the obligation arose where the anticipated treatment 'is certain or is the very purpose of handing over', and then equated this test with 'foreseeability of the consequence' in the example provided.[89]

(c) The author submits the test should be 'reasonable foreseeability"

115 The author contends that the appropriate test should be one of 'reasonable foreseeability' of a 'real and personal risk', which is consistent with the approach taken by the CAT when assessing the substantively similar obligation of *non-refoulement* arising under article 3(1) of the *Convention against Torture*.

(ii) The mistreatment and punishment the author fears is prohibited by article 7

116 The author stated before the Delegate and the Member that upon being handed over to the PFLP-GC, he feared indefinite detention during which he would be held in solitary confinement for long periods of time. In separate evidence provided during telephone conversations with his legal advisers, the author further claimed that he feared being tortured by such methods as suspension and cigarette burns. The author's understanding is that he would not be 'released' unless he was dead or rendered 'totally useless' because this has been the fate of others he has heard about. With respect to his fear of possible execution, the author is aware that others who tried to leave the PFLP-GC have been 'disappeared' by the PFLP-GC or executed by firing squad. Such fears clearly fall within the range of harms that article 7 requires the State party to protect against.

117 The Delegate who initially rejected the author's application for a Protection (Class XA) Visa, found that the consequences feared by the author if returned to Syria were of sufficient gravity to constitute 'persecution' for the purposes of the *Refugee Convention*.[90] That is, the decision-maker was satisfied that the author feared 'serious violations' of his human rights. The Delegate was also satisfied that the author's fear of persecution was based on his political opinion which diverged from that of the PFLP-GC.[91] Although a finding of fear of persecution for *Refugee Convention* purposes is not the same as a finding of fear of an article 7 violation, there is significant overlap in the author's case.

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87 Human Rights Committee, General Comment 31, 'Nature of the General Legal Obligation on States Parties to the Covenant' [12] (Eightieth Session, 2004) UN Doc CCPR/C/21/Rev 1/Add.13 (2004).

88 See further *Ng v Canada* Communication 469/1991[6.2], [14.1], [14.2], [15.1(a)] and [15.3].

89 Ibid [6.2].

90 Delegate's Decision, Part C section 3.3.

91 Ibid [4.2].

The Member was also satisfied that the type of treatment the author said he feared would fall within the definition of persecution.[92]

118 The author submits that, as well as satisfying the test of 'persecution' under the *Refugee Convention*, the treatment he fears also falls within the prohibition contained in article 7. The State party has not disputed in its Submission that, if substantiated, the author's fear of indefinite imprisonment and possible execution by the PFLP-GC would constitute torture or other forms of treatment or punishment prohibited by article 7.

119 The author respectfully submits that the Committee should find that the torture, mistreatment and punishment the author fears falls within the types of torture, mistreatment and punishment prohibited by article 7.

(iii) If there is 'reasonable foreseeability' of an article 7 violation, the State party has an obligation of *non-refoulement*

120 The State party has not contested that it has an obligation of *non-refoulement* under the Covenant if the author's evidence establishes to the required standard that he would be subjected to an article 7 violation on his return to Syria. However the State party argues that the Committee has taken a strict approach to the 'real risk' test, requiring that the author establish that the violation 'is certain or is the very purpose of handing over' before a State party's obligation of *non-refoulement* arises.[93] The State party relies on *Ng v Canada* for support, but fails to cite the example that the Committee provides in *Ng*, which clearly illustrates that the test is not as strict as the State party suggests. The Committee's view is that:

> …a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State **in circumstances in which it was foreseeable that torture would take place**.[94] (Emphasis added)

121 The Committee's example uses foreseeability as the standard, which falls a long way short of requiring certainty. Elsewhere in *Ng v Canada*, the Committee has described the test as one of 'real risk' that is equivalent to a 'necessary and foreseeable consequence'.[95] Given the variety of tests proposed in *Ng*, the author submits that the requirement of virtual certainty proposed by the State party in its submission[96] is wrong, and sets the standard far too high for the purposes of the Covenant. Most people who fear article 7 violations if *refouled* will be in much the same position as the author, trying to substantiate their fears in the context of a secretive and authoritarian State like Syria with a record for widespread human rights abuses. In such circumstances, a certain risk is plainly impossible to ever prove. Such a high standard of proof is inconsistent with general legal principles, and is particularly inappropriate where the alleged victim, who is in a vulnerable state due to the very violations complained of, is in detention and has a

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92 RRT Decision [105].

93 State party's Submission [44].

94 *Ng v Canada* Communication 469/1991[6.2].

95 Ibid [6.2] and [15.1(a)].

96 State party's Submission [44].

very limited ability to provide historical documentary evidence or fully participate in the preparation of his or her case.

122 The author urges the Committee to resolve the confusion about the standard of risk required by being guided by the approach of the CAT to the obligation of *non-refoulement* arising under article 3(1) of the *Convention against Torture*, which provides that:

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

123 This obligation is substantively similar to that under article 7, although it should be noted that the range of prohibited treatment that attracts the obligation of *non-refoulement* under the Covenant is not limited to torture. The CAT has considered the normative content of the obligation arising under article 3(1) in a General Comment[97] and over 40 decisions under article 22 of the *Convention against Torture*. That jurisprudence establishes that the term 'danger' refers to a 'foreseeable, real and personal risk' or a 'personal and present danger'.[98] Although that risk must be 'assessed on grounds that go beyond mere theory or suspicion … the risk does not have to meet the test of being highly probable'.[99] The author submits that the approach of the CAT is best described as a test of 'reasonable foreseeability,' and that this approach should be adopted by the Committee. That is, the State party's obligation of *non-refoulement* arises if the author can establish that it is reasonably foreseeable that he will be subjected to article 7 violations on his return to Syria.

(iv) It is reasonably foreseeable that a violation of article 7 will occur if the author is returned to Syria

124 The author argues, consistent with the approach of the CAT, that although the burden to present an 'arguable' case is on the author, the State party remains under an obligation to ensure that a person's security is not endangered by *refoulement*, even if there are doubts about the facts adduced by the author.[100] In this context, the State party may be obliged to make sufficient efforts to determine whether there are substantial grounds for believing that the author would not be in danger of being subjected to torture, particularly where the State concerned has demonstrated a pattern of human rights violations.[101]

125 Further, as the CAT has recognized, an important relevant consideration is whether the State concerned is one in which there is 'evidence of a consistent pattern of gross, flagrant

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97 Committee Against Torture, General Comment No 1, 'Implementation of Article 3 of the Convention in the Context of Article 22', UN Doc A/53/44 (1996), Annex IX.

98 Committee Against Torture, General Comment No 1,' Implementation of Article 3 of the Convention in the Context of Article 22', [7], UN Doc A/53/44 (1996), Annex IX; *Haydin v Sweden*, Communication No 101/1997, UN Doc CAT/C/21/D/101/1997 (1998), [6.5].

99 Committee Against Torture, General Comment No 1,' Implementation of Article 3 of the Convention in the Context of Article 22', [6], UN Doc A/53/44 (1996), Annex IX; *Haydin v Sweden*, Communication No 101/1997, UN Doc CAT/C/21/D/101/1997 (1998), [6.5].

100 *Mutombo v. Switzerland* Communication No 13/1993 [9.2].

101 *A S v Sweden* Communication No 149/1999, CAT/C/25/D/149/1999, [8.6]. See also *Alan v Switzerland* Communication No 21/1995, CAT/C/16/D/21/1995.

or mass violations of human rights'.[102] Undeniably, Syria fits this description. Although such a situation does not, of itself, constitute sufficient ground to invoke the obligation of *non-refoulement*, the CAT has taken the view that it may establish a strong presumption.[103]

126 The facts outlined in the following paragraphs show that it is reasonably foreseeable that, if returned to Syria, the author will suffer torture, mistreatment and punishment which is prohibited by article 7.

(a) It is reasonably foreseeable that the author will be detained on his return to Syria

127 The State party begins by claiming that there is insufficient evidence that the author left Syria illegally, as found by the original Delegate and the RRT.[104] However, the author has provided evidence which is credible and which clearly shows he left Syria illegally.

128 The author fears detention by the Syrian authorities upon his return because it will precipitate the next step in the chain of events that he fears, which is that the PFLP-GC will be alerted as to his whereabouts and that this will lead to the PFLP-GC subjecting him to article 7 violations, and possibly execution, to punish him for his desertion.

129 The State party concedes that failed asylum seekers returning to Syria are usually initially detained for questioning, but that attempting to gain asylum elsewhere is 'unlikely' to result in punishment.[105] The State party claims that returning asylum seekers are released when Syrian authorities establish they are not wanted for previous criminal activities (other than illegal departure for which they are detained for three months[106]).[107] But how can the State party's confidence about this matter be explained in the absence of the rule of law in Syria? The State party does not provide the evidence on which it bases its confidence, making reference only to 'research' conducted by DIMIA during June, July and August 2004.[108] This research has not been provided to the author, despite its request of 23 December 2004.[109] The State party also refers to the RRT being 'satisfied' that the Syria authorities will 'quickly release' the author once they establish that he does not have a criminal record.[110] But no information is provided to show how and why the RRT could have been satisfied that the author would get a fair hearing, or that what constitutes a 'criminal offence' in Syria is sufficiently clear so as to not apply to the author. Especially given that he deserted and obtained and used a false passport. In any event, the author's fear is that his detention will result in being handed over to the PFLP-GC, not that he will be punished for seeking asylum. The full scope of the author's fears needs to be addressed. In this regard, the State party has failed to show that there are substantial

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[102] See *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, article 3(2) (entered into force 26 June 1987) (*Convention against Torture*). See also Committee Against Torture, General Comment No 1, 'Implementation of Article 3 of the Convention in the Context of Article 22', [8(a)], UN Doc A/53/44 (1996), Annex IX.

[103] See, for example, *Tala v Sweden* Communication No. 43/1996, CAT/C/17/D/43/1996.

[104] State party's Submission [48-9].

[105] Ibid [53].

[106] RRT Decision [68].

[107] State party's Submission [53] - DIMIA research. We have requested these materials.

[108] State party's Submission footnotes 3-5. The author has requested this information from the State party, but it had not yet been provided at the time the author submitted his response to the Committee.

[109] See paragraphs 2–3 above.

[110] State party's Submission [53], RRT Decision [117].

grounds for believing that the author would not be in danger of being detained and subsequently handed over to the PFLP-GC.

130 Based on the author's evidence, which has been accepted by agencies of the State party, and the State party's failure to disprove this evidence, the author submits that it is reasonably foreseeable that the author will be detained by Syrian authorities on being returned to Syria.

(b) Co-operation between the PFLP-GC and Syria means that it is reasonably foreseeable that the author will suffer a violation of article 7

131 Next, the State party asserts that even if detained by the Syrian officials for illegally leaving the country on his return, the evidence does not satisfactorily establish that the author would be subjected to torture or cruel, inhuman or degrading treatment or punishment.[111] But this is not the author's claim, although there is substantiated evidence that torture and maltreatment of detainees is common practice in all Syrian detention centres and prisons.[112] Nor is the author claiming that detention, in and of itself, is a violation of article 7, as the State party suggests.[113]

132 The author has consistently stated that what he feared was not torture, mistreatment or punishment by Syria, but instead being handed over by Syrian authorities to the PFLP-GC who would torture, mistreat or punish him.

133 The State party claims, relying on findings by the RRT, that there is no evidence to suggest that the Syrian intelligence authorities (*mukhabarat*) work closely with the PFLP-GC or that they are likely to hand the author over to the PFLP-GC.[114] Yet there is substantial evidence of this cooperation.[115] Moreover, in the author's own case, it is clear from the separate instances of questioning of members of his family by the SISO[116] that there is co-operation between the PFLP-GC and the Syrian authorities. The author left Syria illegally, and hence Syria would have no awareness that he was no longer in the country. It is reasonable to infer that the PFLP-GC, who would have been aware of his departure relatively soon after his disappearance into hiding, would have informed SISO that they were looking for the author and requested assistance from SISO. The strong evidence of cooperation between the Syrian authorities and the PFLP-GC should be sufficient to establish the likelihood that the author would be transferred into the custody or control of the PFLP-GC because of his desertion, once detained by the Syrian Government on his return. As to the author's treatment at the hands of the PFLP-GC, the author has also provided detailed evidence concerning what he fears will happen to him.[117]

134 The State party further claims that the PFLP-GC is unlikely to take action against a 'deserter' on the grounds of desertion alone, particularly if the person did not hold a leadership position.[118] But this misunderstands the seriousness of the author's desertion,

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111 State party's Submission [50-1].

112 Syrian Human Rights Committee Annual Report 2003, cited in Communication, Part 6 [9].

113 State party's Submission [35].

114 Ibid [54].

115 See above [18–22].

116 RRT Decision [73].

117 See [31–6], [45], [77] and [129].

118 State party's Submission [55], DIMIA research. We have requested these materials.

which was because he no longer agreed with the terrorist strategies of the PFLP-GC, and involved his refusal to undertake an imminent terrorist mission. The author's desertion, in the context of a peace process with which the PFLP-GC disagreed, but which had considerable popular support, was likely to be taken very seriously by the PFLP-GC. The State party's depiction of the author as an inconsequential member of the organization[119] misunderstands the seriousness of his desertion at such a time, and the pressing need for the PFLP-GC to respond in such a way as to deter others from doing likewise.

135 After his arrival in Australia, the author learned of the arrest by the SISO of someone he worked with in the PFLP-GC for allegedly being an Israeli spy and the subsequent questioning of his brother and other members of his family by the Syrian authorities. These events place him at increased risk of a violation of article 7 on his return, as they are not only further evidence of the interest of the Syrian authorities, and through them the PFLP-GC, in his whereabouts, but also raise the possibility that he may be suspected to be an Israeli spy as well, which, because the PFLP-GC has particular concerns due to his knowledge of sensitive information from the time during which he worked in the Al Yarmouk office of the PFLP-GC, increases the likelihood that he will be subjected to severe mistreatment which is prohibited by article 7.

(v) Conclusion

136 It is reasonably foreseeable that, if returned to Syria, the author will be immediately detained by Syrian authorities then and handed over to the PFLP-GC, who will punish him severely for his disloyalty and desertion by holding him indefinitely as a prisoner, torturing him, subjecting him to other forms of cruel, inhuman and degrading punishment, and possibly executing him. Consequently, the State party has an obligation under article 7 of the Covenant to refrain from deporting the author to Syria.

C. Article 9(1)

137 The obligation assumed by the State party under article 9(1) of the Covenant is to protect the right to liberty and security of persons by preventing arbitrary arrest or detention. The obligation is applicable to all deprivations of liberty, including immigration control.[120] All individuals within the State party's territory and subject to its jurisdiction must be protected from article 9(1) violations,[121] including aliens[122] irrespective of their nationality or statelessness.[123]

138 There are two permissible limitations to the right to liberty protected by article 9(1). First, the detention 'must be in accordance with procedures as are established by law'. Secondly, the law itself, as well as the enforcement of the law, must not be arbitrary.[124]

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[119] State party's Submission [55].

[120] Human Rights Committee, General Comment 8, 'Right to liberty and security of persons (Article 9)' [1] (Sixteenth session, 1982) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev 6 at 130 (2003).

[121] Covenant article 2(1).

[122] Human Rights Committee, General Comment 15, 'The position of aliens under the Covenant' [7] (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 6 at 140 (2003).

[123] Ibid [1].

[124] Sarah Joseph, Jenny Schultz and Melissa Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) 11.10.

The test for arbitrariness is that the law and the detention must be reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances.[125]

139 The author arrived in Australia by boat on 11 October 2000, without a visa and seeking asylum as a refugee. He was immediately detained under s189(1) of the *Migration Act*, which provides for mandatory detention of 'unlawful non-citizens' seeking to enter or having entered the Australian migration zone, until such time as they are granted a visa or they are removed or deported from Australia pursuant to other sections of the Act.

140 Four years and four months later, the author remains in immigration detention today. For most of this time, the author has been held at the remote Port Hedland Immigration Detention Centre in Western Australia. On no occasion have Australian immigration officials made an assessment of factors specific to the author that may justify his continuing detention, and they have not provided a justification for the author's continued detention that is based on factors specific to him.

141 The Committee has found the State party's mandatory detention of 'unlawful non-citizens', previously called 'designated persons', to be in violation of article 9(1), in four earlier communications under the Optional Protocol.[126] In the first of these (A's case), the Committee took the view that continued detention may be considered arbitrary, unless it is justified on grounds that are particular to the author's case, even if the author's entry into Australia was illegal.[127]

142 This view was confirmed several years later in C's case, in which the Committee took the view that 'in order to avoid the characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification'.[128]

143 The Committee reiterated the same view in 2003 in response to two further communications, Baban[129] and Bakhtiyari.[130] The Committee has also expressed its concerns about the State party's compliance with article 9(1) in its Concluding Observations to Australia's Periodic Report in 2000, urging that alternatives to mandatory detention be instituted in order to maintain an orderly immigration process and, at the same time, comply with the State party's obligations under the Covenant.[131]

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[125] *A v Australia* Communication No 560/1993 [9.2]. See further *Van Alphen v Netherlands* Communication No 305/1988 [5.8].

[126] *A v Australia* Communication No 560/1993; *Mr C v Australia* Communication No 900/1999; Baban v Australia Communication No 1014/2001; Bakhtiyari v Australia Communication No 1069/2002.

[127] *A v Australia* Communication No 560/1993 [9.4].

[128] *Mr C v Australia* Communication No 900/1999 [8.2].

[129] Baban v Australia Communication No 1014/2001 [7.2].

[130] Bakhtiyari v Australia Communication No 1069/2002 [9.2].

[131] UN Doc A/55/40 (2000) [526-7].

(i) The mandatory detention law under which the author was detained was not 'lawful' because it was arbitrary; the law is not reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances

144 The State party argues that the author's detention was at no stage unlawful or arbitrary and that it was reasonable and necessary in all the circumstances and could not be said to be inappropriate, unjust or unpredictable.[132]

145 The State party contends that the Covenant's requirement that detention be 'lawful' requires only that the detention be in accordance with domestic law.[133] In support, the State party refers to Nowak's commentary on the Covenant and Bossuyt's guide to the *travaux preparatoires* for the drafting of article 9.[134] However, this cannot be correct. It is a firmly established rule of international treaty law that a State may not invoke provisions of its internal law as justification for its failure to perform a treaty obligation.[135] Therefore, detention 'on such grounds and in accordance with such procedure as are established by law' cannot be interpreted to require lawfulness in the narrow sense of law in the domestic legal system, no matter what difficulties the drafters may have had with this proposition. If this were correct, the protection provided by article 9(1) would be illusory.

146 The language of article 9(1) embodies a human right, therefore it necessarily requires that the law not be arbitrary and, in particular, that the law must have regard to the object and purpose of the Covenant and not violate any of the State party's other obligations under the Covenant. While the promulgation of the law under which the author was detained complied with the formal requirements of the Australian Constitution,[136] the State party must also show that the law is 'reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances' before it can claim it is lawful in the sense required by article 9(1).[137]

147 The State party, later in its submission, appears to contradict its own argument that 'lawful' requires only that detention is in accordance with domestic law, when it states that 'article 9(1) requires that a law which allows or authorizes a deprivation of liberty must not be arbitrary'.[138] The State party goes on to argue, as it did in its response to the Committee's finding in A's case, that the law is not arbitrary because it is an exceptional measure reserved primarily for people arriving in Australia without authorization.[139] The State party accepts that 'the main test in relation to whether detention for immigration control is arbitrary is whether it is reasonable, necessary, proportionate, appropriate and

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[132] State party's Submission [66].

[133] Ibid [67].

[134] Ibid [67-8].

[135] *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, article 27 (entered into force 27 January 1980). See further, Human Rights Committee, General Comment 31, 'Nature of the General Legal Obligation on States Parties to the Covenant' [4] (Eightieth Session, 2004) UN Doc CCPR/C/21/Rev 1/Add.13 (2004).

[136] *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38 and *Al-Kateb v Godwin, Keenan and Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA 37.

[137] *A v Australia* Communication No 560/1993 9.2. See further *Van Alphen v Netherlands* Communication No 305/1988 [5.8].

[138] State party's Submission [75]. See also [71], 'Both the law under which the detention is authorized and the manner in which it is carried out or enforced must meet these criteria [of not being arbitrary].'

[139] State party's Submission [76].

justifiable in all the circumstances'.[140] The State party then considers the requirements of necessity and reasonableness and introduces a new consideration of 'flexibility'. It makes no arguments about the other elements of proportionality, appropriateness and justifiability.

(a) 'Unnecessary'

148 The State party contends, as it has in previous communications, that the law is *necessary* to uphold the integrity of the migration system because it enables proper assessment of claims before entry is allowed, ensures the availability of applicants for processing and for removal if found not to be refugees.[141] The Committee has acknowledged that 'the fact of illegal entry may indicate a need for investigation ... and there may be other factors particular to the individual …which may justify detention for a period', and has repeatedly emphasized that detention for longer than what is strictly justified by the individual circumstances of each detainee, is arbitrary (not necessary) and therefore unlawful under article 9(1).[142]

149 It is clear from the State party's Submission that the law is imposed regardless of individual circumstances, and is justified by general considerations that override any concern with the human rights of individual detainees. There is no indication that the State party is prepared to consider adopting less intrusive and more individually tailored measures, which would maintain the integrity of the migration system in a manner that does not violate article 9(1), despite repeated recommendations by the Committee that this would be the appropriate course.[143] The Committee has suggested that the imposition of reporting obligations, sureties or other conditions that would take account of individual circumstances should be considered. The State party fails to demonstrate why such measures would not achieve the same ends as mandatory detention is designed to fulfil. Therefore, it does not establish that the mandatory detention laws are necessary.

150 The State party also claims that it is an incident of sovereignty that a State has the right to control the entry of non-citizens into its territory,[144] but this misrepresents its international legal obligations under the Covenant. The principle of sovereignty must accommodate a State's treaty obligations, including its human rights obligations under the Covenant. Otherwise, for what purpose did it become a party to the Covenant?

(b) 'Unreasonable'

151 The State party argues that its mandatory detention laws are *reasonable* because there is a strong likelihood that asylum seekers will abscond into the community and, with the support of local ethnic communities, become impossible to locate.[145] It claims that the absence of a system of identity cards or other national registration systems makes it difficult for illegal immigrants to be located.[146] But again, the State party fails to indicate

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140 Ibid [72].

141 Ibid [77].

142 *A v Australia* Communication No 560/1993 [9.4].

143 *Mr C v Australia* Communication No 900/1999 [8.2]; Baban v Australia Communication No 1014/2001 [7.2]; Bakhtiyari v Australia Communication No 1069/2002 [9.3]; Concluding Observations to Australia's Periodic Report, UN Doc A/55/40 (2000) [526-527].

144 State party's Submission [77].

145 Ibid [79].

146 Ibid [78].

why less severe measures would not serve these same purposes. In this respect, the State party carries the evidentiary onus. The State party does not even evince a willingness to explore the alternatives that might be available. Therefore it fails to establish, and fails to discharge the evidentiary onus upon it, that a measure as punitive as prolonged mandatory detention is a reasonable response to the problem that asylum seekers may abscond into the community.

(c) 'Disproportionate'

152 In response to the State party's submissions, the author argues not only that the law is unnecessary, unreasonable and inflexible, but also that it is disproportionate, inappropriate and not justifiable in all the circumstances. It is *disproportionate* because it imposes the most severe of penalties, the deprivation of liberty, as a mandatory response to all 'unlawful non-citizens' who enter Australia's migration zone without a visa, without distinction. The deprivation of liberty, especially if it is likely to be prolonged, should only be used as a last resort in exceptional circumstances. The goal of ensuring the integrity of the migration system can be achieved through less restrictive means, as illustrated by the alternative detention model proposed by HREOC in 1998.[147] Under this model, asylum seekers may initially be held in closed detention, but a decision is made about the form of release most appropriate to the applicant's circumstances within a time period of 30 days, which may be extended to a maximum of 90 days if needed to consider grounds for possible denial of release. Those who qualify for release are granted a bridging visa, which specifies conditions tailored to each individual's situation. A breach of the conditions without good reason, or a change of circumstances, may result in the applicant being returned to detention, but they are able to reapply for release within 30 days. When compared to this model, the State party's response is clearly disproportionate.

(d) 'Inappropriate'

153 The law is *inappropriate* because its principal purpose is to deter intending asylum seekers. It is not informed by the State party's obligations under the Covenant to respect the human rights of asylum seekers. Mandatory detention that is ongoing and prolonged is an inhumane method of deterrence and places an enormous unwarranted strain on the mental health and wellbeing of asylum seekers. The regime is inflexible and punishes those who are legitimately seeking asylum as well as those who make fraudulent claims.

(e) 'Unjustified'

154 The mandatory detention laws are also *unjustified*. The State party is the only western country that imposes mandatory detention on all asylum seekers that arrive without valid documentation. Other comparable asylum seeker receiving countries have struck a balance between maintaining border security and protecting the fundamental human right to flee from persecution. European countries, such as Germany, Spain and Austria, have a limit on the period of time that asylum seekers are held in detention.[148] Others, including Finland, Denmark and Belgium, only detain asylum seekers in exceptional circumstances when they feel there is a high risk of absconding.[149] The efficacy of such arrangements,

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147 *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals*, *Report of the HREOC Inquiry into the Detention of Unauthorised Arrivals in Australia* (1998) 235-44.

148 Amnesty International Australia, 'Alternatives to Detention', <http://www.amnesty.org.au/whats_happening/refugees/resources/fact_sheets/alternatives >.

149 Ibid.

which do not sacrifice respect for individual human rights in the name of national security, demonstrate that the State party's approach is unjustified.

155 Since the introduction of mandatory detention in Australia in 1992, a number of alternative schemes have been proposed to the State party, in addition to the HREOC proposal outlined above. The Refugee Council of Australia has proposed a three stage model encompassing closed detention, open detention and community release, which would enable the authorities to move applicants over the range of detention stages in a way that best suits changing circumstances as well as in response to past behaviour.[150] The Justice for Asylum Seekers Alliance Detention Reform Working Group proposed a monitored release regime based on risk assessment, combined with periodic judicial or administrative review of the detention of those who are considered to pose a high security risk.[151] In light of these and other efforts to assist the State party, it might be expected that the State party would provide a strong justification for its approach in its submission. But it fails to address this element of the test of whether mandatory detention for the purposes of immigration control is arbitrary.

156 Therefore the mandatory detention provisions in the *Migration Act*, while lawful in a formal sense, are not 'lawful' in the substantive sense required by article 9(1) because the law is arbitrary. The arbitrary nature of the law is evidenced by its incompatibility with the State party's obligations under the Covenant, and the State party's failure to show whether, as a means of maintaining the integrity of the migration system, it is reasonable, necessary, proportionate, appropriate and justifiable in all the circumstances.

(ii) The policy is 'inflexible'

157 Also in defence of its system, the State party claims that the mandatory detention regime is 'flexible' enough to allow for the release of people from detention centres in exceptional circumstances.[152] But the Committee may recall the facts of C's case, where the Minister repeatedly refused to use his powers to release C into the care of his family in Australia while his status was being determined, despite his seriously deteriorating psychiatric condition. The Committee accepted that the medical evidence was virtually unanimous that C's psychiatric illness had developed as a result of his protracted immigration detention.[153] The Committee continues:

> The Committee notes that the State party was aware, at least from August 1992 when he [the author] was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessment of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that

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150 <http://www.refugeecouncil.org.au/html/current_issues/alternatives1.html>.

151 Justice for Asylum Seekers Alliance Detention Reform Working Group, *Alternative Approaches to Asylum Seekers: Reception and Transitional Processing System*, June 2003, http://www.bsl.org.au/pdfs/Alternative_approaches.pdf.

152 State party's Submission [82].

153 *Mr C v Australia* Communication No 900/1999 [8.4].

point the author's illness had reached such a level of severity that irreversible consequences were to follow.[154]

158 The example of C's case, far from providing a positive example of the system's 'flexibility' in the context of circumstances that were irrefutably 'exceptional', shows just how hollow the State party's claim of flexibility is, further attesting to the arbitrariness of the law. The recent revelation that Cornelia Rau, a permanent resident of the State party who escaped from hospitalisation for a serious psychiatric illness and was imprisoned, including in immigration detention for a period of 10 months,[155] is further evidence of the lack of 'flexibility' in the system. Despite being listed as a missing person since August 2004, and the subject of a national appeal in November 2004, it took 10 months to establish her identity. Further, despite patent, possibly irreparable, deterioration in her psychiatric condition while in detention, she received no independent psychiatric assessment. Instead, her condition was 'managed' by holding her in isolation.[156]

(iii) The author's detention was arbitrary

159 The final issue is whether, in the author's specific case, the application of the law was arbitrary. The State party argues that the author's detention was justifiable and appropriate and not arbitrary or otherwise in violation of article 9(1) because first, the law required his detention and, secondly, because he was detained so his application for asylum could be assessed. The Committee has held that 'detention should not continue beyond the period for which the State can provide appropriate justification', accepting that there may be a need for initial detention of illegal entrants for the purposes of investigation.[157] However, to justify detention beyond this initial period, there must be other factors, particular to the individual, such as the likelihood of absconding and lack of cooperation.[158] In the absence of such factors, 'detention may be considered arbitrary, even if entry was illegal'.[159] The Committee has also determined that article 9(1) requires that the grounds justifying detention of an individual must be subject to periodic review.[160]

160 The State party provides no evidence of any specific threats and risks associated with the author that might have justified his continued detention, over more than four years, as necessary and reasonable for the purposes of fully assessing his application.[161] Nor is there any provision for the periodic review of the reasons for his detention.

161 Indeed, it is clear that the State party's policy is to subject all asylum seekers to the same mandatory detention regime without any assessment of the reasonableness, necessity, proportionality, appropriateness and justifiability of detention in the circumstances of each individual case. Instead of advancing any justifications particular to the author's case, the State party disingenuously contends that the author chose his continued detention because he pursued the avenues available to him to have the decision not to grant him a protection visa reviewed – that he was and still is free to leave the country at

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154 Ibid.

155 'Solved: mystery of detainee "Anna"', *The Age* (Melbourne, Australia), 5 February 2005, lead story.

156 Ibid. See further, 'Minister rules out apology to "Anna"', *The Sunday Age* (Melbourne, Australia), 6 February 2005; 'Howard orders inquiry into Rau case', *The Age* (Melbourne, Australia), 7 February 2005.

157 *A v Australia* Communication No 560/1993 [9].

158 *A v Australia* Communication No 560/1993 [9.4].

159 Ibid.

160 Ibid [9.4].

161 *Van Alphen v Netherlands* Communication No 305/1988 [5.8].

any time. This view reveals the State party's complete lack of regard for its obligations under article 9(1) in relation to the author.

(iv) Conclusion

162 The law under which the author is detained is arbitrary, and therefore unlawful in a substantive sense, which is a violation of article 9(1). Further, the author's prolonged detention, beyond what was reasonably necessary to establish his identity and the details of his claim, is arbitrary and therefore a violation of article 9(1) because no factors were identified, particular to him, that justified it.

D. Article 9(4)

163 The obligation assumed by the State party under article 9(4) is to guarantee that all persons who are deprived of their liberty by arrest or detention, including detention for the purposes of immigration control, are able to test the legality of the detention before a court.[162] The guarantee must be available to all individuals within Australia's territory and subject to its jurisdiction,[163] including aliens,[164] irrespective of their nationality or statelessness.[165]

164 The Committee has consistently taken the view that power of review of the 'lawfulness of detention' by the courts under article 9(4) is not limited to whether the detention was in compliance with domestic law; it must include the possibility of ordering release.[166] That is, the effects of judicial review must be real and not merely formal and the court must be empowered to order release if the detention is incompatible with any of the provisions of the Covenant.[167]

165 In addition, as argued above in relation to the meaning of 'lawfulness' in article 9(1), it is a basic principle of international law that a State may not invoke provisions of its internal law as justification for its failure to perform a treaty obligation. Therefore lawfulness, as required by article 9(4), does not only mean that the detention must be lawful according to domestic law. It must also be consistent with the State party's obligations under the Covenant.[168]

166 The author was taken into immigration detention as an 'unlawful non-citizen' on his arrival in Australia on 11 October 2000, pursuant to ss189 and 196 of the *Migration Act* . Following that:

(a) His application for a protection visa was refused by a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs on 27 June 2001.

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[162] Human Rights Committee, General Comment 8, 'Right to liberty and security of persons (Article 9)' [1] (Sixteenth session, 1982) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev 6 at 130 (2003).

[163] Covenant article 2(1).

[164] Human Rights Committee, General Comment 15, 'The position of aliens under the Covenant' [7] (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 6 at 140 (2003).

[165] Ibid [1].

[166] *A v Australia* Communication No 560/1993 [9.5].

[167] Ibid.

[168] See above paragraph 145.

(b) This decision was affirmed by the RRT on 31 October 2001. The extent of the author's right to judicial review of the RRT Decision was determined by the operation of the privative clause, s 474 of the *Migration Act*, which imposed significant restrictions on the grounds of review available to the author, limiting them to the question of whether the RRT Decision was made in accordance with domestic law.

(c) The author's application to the Federal Magistrates Court for judicial review of the RRT Decision was dismissed on 10 May 2002 because Raphael FM was unable to find any reviewable error in the reasons of the RRT.[169]

(d) The author's subsequent appeal to the Federal Court was also dismissed on 29 October 2002 by French J who concluded that the operation of the privative clause (s474) left 'no arguable basis for review'.[170]

(e) The author has also been unsuccessful in his request that the Minister exercise his discretionary powers under s 417 of the *Migration Act* to substitute a more favourable decision for that of the RRT, which would have led to his release.

167 As explained in the Memorandum of Advice attached as Annexure I, further domestic remedies were 'either not available or would not be effective' to address the lawfulness of his detention, as required by article 9(4).[171] The remedy of *habeas corpus* referred to in the State party's Submission can only address the issue of the lawfulness of the author's detention under domestic laws, which is not at issue in the author's case as the Federal Magistrates Court and Federal Court found.[172]

168 The Committee has previously found that the power of judicial review of the detention of 'designated persons' (in A's case), and 'unlawful non-citizens' (in the cases of C, Baban and Bakhtiyari), as set out by the *Migration Act*, is limited to the formal assessment of whether the person in question was in fact a 'designated person'/'unlawful non-citizen' to which the relevant section applies.[173] That is, the effect of the law is that detention cannot be effectively reviewed by a court because the Act prevents a court from making a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case, and there is no discretion to order a person's release in a particular case.[174]

169 In short, the Committee has found that the *Migration Act* has extinguished substantive judicial review.[175] Therefore, the Committee has found that the State party has failed to fulfil its obligations under article 9(4), which requires that review is not limited to whether the detention was in compliance with domestic law, but that all people held in immigration detention are able to exercise the right to have their detention substantively

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169 *WABS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 73.

170 *WABS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1335 [14].

171 Memorandum of Advice [32].

172 Ibid [24].

173 *A v Australia* Communication No 560/1993 [9.5] (since the enactment of the *Migration Amendment Act 1992* (Cth) of 6 May 1992); *Mr C v Australia* Communication No 900/1999 [7.4]; Baban v Australia Communication No 1014/2001 [7.2]; Bakhtiyari v Australia Communication No 1069/2002 [9.4].

174 *Mr C v Australia* Communication No 900/1999 [7.4].

175 Ibid.

reviewed by a court in order to ensure that it is compatible with the Covenant and not arbitrary.

170 The limited power of judicial review under the *Migration Act* does not fulfil the State party's obligations under article 9(4) to provide for substantive review of the author's detention.

171 The State party claims that judicial review of the 'lawfulness' of the author's detention is available, as required by article 9(4). The State party's Submission centres on what review of the 'lawfulness' of detention entails, making the same argument as it does in relation to 'lawfulness' required by article 9(1): that 'lawful' in the terms of the Covenant does *not* mean 'lawful at international law' or 'not arbitrary'.[176] Rather, the State party's argument is that the obligation under article 9(4) is to provide for judicial review of the lawfulness of detention according to domestic law, and does not extend to providing for review of the merits of that detention.[177]

172 The State party's narrow interpretation of its obligation to ensure judicial review of the 'lawfulness' of detention is inconsistent with the views of the Committee, as recognized in its submission.[178] If the State party's position is correct, it would mean that a State party could limit the power of a court to order release of a mandatory detainee in whatever way the State party sees fit, by way of domestic legislation. Such a reading of the Covenant would make the protection provided by article 9(4) against arbitrary exercise of State power purely illusory, and therefore cannot be correct.

173 The State party's proposition is also inconsistent with the basic rule of international law that a State party's treaty obligations cannot be defeated by opposing obligations under domestic legislation or even constitutional law.[179]

174 The State party contends that the author could have tested the legality of his review in the High Court by seeking *habeas corpus* or a writ of mandamus or other appropriate remedy.[180] However, as the Memorandum of Advice on this matter indicates, the remedy of *habeus corpus* can only address the issue of the lawfulness of the author's detention under domestic laws,[181] as the Committee has observed before in the Baban and Bakhtiyari cases.[182]

175 Whether the author's detention is lawful pursuant to the provisions of the *Migration Act* is not at issue, and therefore the views of the Committee in the Stephens case, cited by the State party, are not applicable.[183] There are no other judicial remedies available to the author in respect of his detention.[184] The State party's suggestion that the author has not

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176 State party's Submission [98].

177 Ibid [98-9].

178 Ibid [103].

179 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, article 27 (entered into force 27 January 1980). See further Human Rights Committee, General Comment 31, 'Nature of the General Legal Obligation on States Parties to the Covenant' [4] (Eightieth Session, 2004) UN Doc CCPR/C/21/Rev 1/Add.13 (2004).

180 State party's Submission [100].

181 Memorandum of Advice [24].

182 Ibid [2-7].

183 Ibid [29-30].

184 Ibid [31].

exhausted the available domestic remedies to have the lawfulness of his detention reviewed is wrong.

E. Conclusion

176 The State party is obliged, under article 9(4), to provide for effective judicial review of immigration detention. This obligation extends beyond testing the legality of detention under domestic law. It also requires that a court must be able to order release if the detention is arbitrary, or otherwise incompatible with any of the provisions of the Covenant. The privative clause in the *Migration Act* is in patent violation of the State party's obligations under article 9(4), as the power of the courts to review the merits of the author's detention has been extinguished.

PART 5. FINDINGS AND REMEDIES

177 Based on the submissions in Parts 3 and 4 above, the author respectfully requests the Committee to act under article 5(4) of the Optional Protocol to make a finding that the State party:

(a) has violated articles 9(1) and 9(4); and

(b) would violate article 7 if it were to remove the author to Syria.

178 The author notes that Australia is required under article 2(3)(a) of the Covenant to provide him with an effective remedy in relation to these violations and potential violations, including compensation. The author submits that the following remedies would be effective:

(a) in relation to articles 9(1) and 9(4):

(i) immediate release from immigration detention; and

(ii) compensation, assessed according to the standards applicable under Australian domestic law, for the following heads of damage:

(A) false imprisonment;

(B) pain and suffering;

(C) loss of income for the period spent in detention;

(D) personal injury, whether physical or psychological, contracted by reason of detention;

(E) future economic loss caused or sustained by reason of his detention; and

(F) the costs of any medical treatment required by the author for any conditions, whether physical or psychological, contracted while in detention; and

(b) in relation to article 7, a guarantee that the author will not be removed to Syria, and the provision of a visa to the author to enable him to permanently reside lawfully within Australia.

179 The author also respectfully requests that the Committee require the State party to inform the Committee of the measures it has taken to give effect to the Committee's views within 90 days.

Schedule

Glossary

Australian Constitution means the Commonwealth of Australia Constitution Act.

Australian Government means the State party.

Author means the alleged victim, Mr Mohamad Muneer Mohammad Taha.

CAT means the Committee against Torture established under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Committee means the Human Rights Committee established under part IV of the Covenant.

Communication means Communication No. 1243/2004 submitted to the Human Rights Committee on 23 January 2004.

Convention against Torture means the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

Covenant means the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

Counsel means Chris Horan.

Delegate means a delegate of the Australian Minister for Immigration and Multicultural Affairs (as it then was) for the purposes of s65 of the *Migration Act 1958* (Cth).

Delegate's Decision means the decision of 27 June 2001 not to grant a protection visa and which was attached to the Communication as Annexure B.

DIMIA means the Australian Department of Immigration and Multicultural and Indigenous Affairs. For convenience, this Response will refer to the current name of this Department.

Fatah means the Fatah faction aligned with the PLO and Palestinian National Authority.

Federal Court means the Federal Court of Australia.

FM means Federal Magistrate.

High Court means the High Court of Australia.

HREOC means the Australian Human Rights and Equal Opportunity Commission.

Member means the decision-maker in the RRT Decision.

Memorandum of Advice means the advice from Chris Horan dated 2 February 2005 and attached as Annexure A] to this Response.

Migration Act means the Australian *Migration Act 1958* (Cth).

Minister means the Australian Minister for Immigration and Multicultural and Indigenous Affairs. For convenience, this Response will refer to the current title of this Minister.

Optional Protocol means the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302.

PFLP means Popular Front for the Liberation of Palestine.

PFLP-GC means the People's Front for the Liberation of Palestine - General Command. This is also known as the Popular Front for the Liberation of Palestine - General Command or PLFP-GC.

PLA means the Palestine Liberation Army.

PLF means the Palestine Liberation Front.

PLO means the Palestine Liberation Organization.

Refugee Convention means the *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150.

Refugee Protocol means the Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267.

Response means this document dated 10 February 2005 responding to the State party's Submission of 26 October 2004.

RRT means the Australian Refugee Review Tribunal.

RRT Decision means the decision by the Member of the RRT on 31 October 2001 not to grant a protection visa which was sent to the Committee shortly after the Communication as Annexure C.

Rules of Procedure mean revision 7 of the Committees Rules of Procedure (4 August 2004). All references to Rules of Procedure in this Response refer to Revision 7 (4 August 2004).

SHRC means the Syrian Human Rights Committee.

SISO means the Syrian International Security Organisation.

State party means the Commonwealth Government of Australia.

State party's Submission means the Australian Government's Submission on Admissibility and Merits dated October 2004 in response to Communication No. 1243/2004.

the Member means the Member of the Refugee Review Tribunal who made the decision of 31 October 2001 not to grant a protection visa.

UNRWA means the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

US means the United States of America.

ANNEXURE A

In the matter of MUHAMMAD MUNEER MOHAMMAD TAHA – UNITED NATIONS HUMAN RIGHTS COMMITTEE, COMMUNICATION NO.1243/2004

MEMORANDUM OF ADVICE

1. I am asked to provide advice in relation to a communication (the "**Communication**") which was submitted to the United Nations Human Rights Committee (the "**Committee**") on behalf of Mr Muhammad Muneer Mohammad Taha pursuant to the First Optional Protocol to the International Covenant on Civil and Political Rights ("**ICCPR**").

2. In particular, my advice is sought on the question whether Mr Taha has any available and effective remedies under domestic law in respect of the matters that are the subject of the Communication.

Background

3. Mr Taha is a stateless Palestinian who was born in Syria in 1969. He arrived in Australia on 11 October 2000, and since that date has been kept in immigration detention pursuant to ss.189 and 196 of the *Migration Act 1958*.

4. On 8 March 2001, Mr Taha lodged an application for a protection visa. On 27 June 2001, a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs refused to grant a protection visa to the applicant. On 31 October 2001, the Refugee Review Tribunal (the "Tribunal") affirmed the delegate's decision.

5. Mr Taha applied to the Federal Court of Australia for judicial review of the Tribunal's decision. The proceeding was subsequently transferred to the Federal Magistrates' Court of Australia. On 10 May 2002, Raphael FM dismissed the application: *WABS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 73. The applicant was unrepresented at the hearing before Raphael FM, who was unable to find any reviewable error in the Tribunal's reasons.

6. Mr Taha filed a notice of appeal to the Federal Court. The appeal was heard by a single judge. On 29 October 2002, French J dismissed the appeal: *WABS v Minister for*

Immigration and Multicultural and Indigenous Affairs [2002] FCA 1335. The applicant was represented at the hearing of the appeal by Professor O'Donovan who acted on a pro bono basis. French J concluded that "[t]he Court's own consideration of the reasons of the Tribunal and of the learned Magistrate in the light of the operation of the privative clause, s 474 of the *Migration Act*, and in the light of the decision of the Full Court in *NAAV*, does not disclose any arguable basis for review".

7. Mr Taha did not have a right of appeal to the Full Court of the Federal Court from the decision of French J.[1] Mr Taha could have applied to the High Court of Australia for special leave to appeal.[2] Any such application was required to be filed within 28 days after the judgment was pronounced.[3] However, after the appeal was dismissed by French J, Mr Taha was advised by Professor O'Donovan that he did not have any prospects of further appeal.

8. At the time that the appeal was determined in October 2002, the prevailing state of the law was that s.474 of the *Migration Act 1958* imposed significant restrictions on the grounds of review. Subsequently, on 4 February 2003, the High Court handed down judgment in *Plaintiff S157 of 2002 v Commonwealth of Australia*,[4] in which the Court narrowly construed the scope of s.474 of the Migration Act (effectively overruling the decision in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*[5]).

9. Mr Taha had also requested that the Minister exercise his discretionary powers under s.417 of the *Migration Act 1958* to substitute a more favourable decision for the decision of the Tribunal. By letter dated 14 May 2003, Mr Taha was informed that the Minister would not consider the exercise of his powers under s.417.

10. On 23 January 2004, Mr Peter Job submitted the Communication to the Committee. The Communication alleges violations of articles 7, 9(1) and 9(4) of the ICCPR.

    10.1 It is claimed that the removal of Mr Taha to Syria will contravene article 7 of the ICCPR, which provides that States parties must not expose individuals to the danger

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1 See s.33(1AAA) of the *Federal Court of Australia Act 1976*

2 *Federal Court of Australia Act 1976*, s.33.

3 Order 69A rule 3 of the High Court Rules 1952 (as in force at the relevant time).

4 (2003) 211 CLR 476.

5 (2002) 123 FCR 298.

of torture or cruel, inhuman or degrading treatment or punishment on return to another country by way of their extradition, expulsion or refoulement.

10.2 It is also claimed that the prolonged detention of Mr Taha contravenes article 9(1) and (4) of the ICCPR, which (broadly speaking) provide for freedom from arbitrary arrest or detention.

11. In October 2004, the Australian Government filed a Submission on Admissibility and Merits. In this submission, the Government has submitted that the allegations made in the Communication are inadmissible on the ground that Mr Taha has failed to exhaust available domestic remedies.

Advice

12. Article 2 of the Optional Protocol to the ICCPR provides that "individuals who claim that any of their rights enumerated in the Covenant have been violated *and who have exhausted all available domestic remedies* may submit a written communication to the Committee for consideration" (emphasis added).

13. Article 5(2)(b) of the Optional Protocol provides:[6]

> "2. The Committee shall not consider any communication from an individual unless it has ascertained that:
>
> …
>
> (b) The individual has exhausted all domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged."

14. The requirement that the complainant must have exhausted all domestic remedies has been interpreted as a requirement to exhaust available and effective remedies under domestic laws. The position has been summarised by one commentator as follows.[7]

> "The requirement that complainants exhaust their local remedies is a feature of all human rights instruments and is a 'well-established rule of customary international law'.[8] In *Nielsen v Denmark*,[9] the European Commission of Human Rights stated that:

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6 See also Rule 90(f) of the *Rules Of Procedure of the Human Rights Committee*, CCPR/C/3/Rev.6.

7 Caleo, "Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 4 *Public Law Review* 175 at 186.

8 *Interhandel Case*, US v Switzerland 1959 ICJ Rep 6, at 27.

> 'the rules governing the exhaustion of domestic remedies … in principle require that recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and sufficient means of redressing the wrongs.'
>
> The Committee has taken a similar view that only remedies which are available and effective need be exhausted.[10]"

15. Further, the Committee has decided that the relevant State bears the onus of proving that the complainant has not exhausted all available and effective domestic remedies. Thus, in *Ramirez v Uruguay*,[11] the Committee concluded that "article 5(2)(b) of the Protocol did not preclude it from considering a communication where the allegations themselves raise issues concerning the availability or effectiveness of domestic remedies and the State party, when expressly requested to do so by the Committee, did not provide details on the availability and effectiveness of domestic remedies in the particular case under consideration."

Article 7: Refoulement

16. The Australian Government submits that Mr Taha has not exhausted all available domestic remedies in relation to his claims. The domestic remedies identified by the Australian Government are as follows.

    16.1 It is claimed that Mr Taha can apply to the High Court to challenge the Tribunal's decision, seeking "a declaration that the decision of the Refugee Review Tribunal be set aside and that the Minister intervene in his case and substitute a more favourable decision".

    16.2 It is claimed that the domestic remedy of *habeas corpus* also remains available to Mr Taha.

    16.3 The Government asserts that: "If successful in these proceedings, a process would be initiated that may result in Mr Taha being granted a visa and released into the

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9 Referred to in Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge Univ Press, 1983), p.59.

10 *Ramirez v Uruguay*, [Communication No 4/1977]; *Sequeira v Uruguay*, Communication No 6/1977.

11 Communication No 4/1977; see also *Sequeira v Uruaguay*, Communication No 6/1977. In each of these cases, the Committee had decided to transmit the communication to the State party requesting information and observations relevant only to the question of admissibility. However, the Committee's usual procedure is to consider simultaneously the admissibility and the merits of a communication: see Rule 91 of the *Rules Of Procedure of the Human Rights Committee*, CCPR/C/3/Rev.6; Office of the High Commissioner for Human Rights, Fact Sheet No.7/Rev.1, *Complaint Proceedures*.

community. This would provide an effective remedy for the alleged potential breach of article 7".

17. Mr Taha has already brought proceedings to challenge the validity of the Tribunal's decision. He was unsuccessful in those proceedings both at first instance and on appeal. The dismissal of those proceedings is likely to preclude Mr Taha from bringing any further proceedings in the original jurisdiction of the High Court seeking to set aside the Tribunal's decision. The earlier proceedings would give rise to a *res judicata* or issue estoppel in relation to the subject matter of those proceedings,[12] namely the question whether the Tribunal's decision was affected by jurisdictional error and therefore invalid or liable to be set aside. In addition, the earlier proceedings would provide a strong reason for the Court to exercise its discretion to refuse to grant relief to Mr Taha. Accordingly, any proceedings brought by Mr Taha in the original jurisdiction of the High Court challenging the validity of the Tribunal's decision would be bound to fail. Such proceedings therefore cannot be regarded as an available or effective remedy for any contravention of article 7 of the ICCPR arising from Mr Taha's removal from Australia and his return to Syria.

18. The Australian Government does not directly suggest that Mr Taha could invoke the *appellate* jurisdiction of the High Court by applying for special leave to appeal.[13] As stated in the Communication, Mr Taha "was given legal advice that he would have no chance of achieving [special] leave to appeal to the High Court, and consequently no basis for appeal". In deciding whether to grant special leave to appeal, the High Court has regard to:

    18.1 whether the proceedings involve a question of law that is of public importance, whether because of its general application or otherwise, or a question of law in respect of which a decision of the High Court is required to resolve differences of opinion between different courts; and

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[12] See generally *Somanader v Minister for Immigration and Multicultural Affairs* (2000) 178 ALR 677; *BC v Minister for Immigration and Multicultural Affairs* [2001] FCA 1669 (Sackville J); [2002] FCAFC 221 (Full Court); *SZBJM v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 404 (Madgwick J); *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 51 at [41]-[78] per Lindgren J.

[13] However, the Government's submission (at paragraph 28) does refer to the fact that Mr Taha had received legal advice that he would not be granted leave to appeal to the High Court, noting that the grounds on which Mr Taha was given such advice are not disclosed in the communication.

18.2 whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.[14]

Mr Taha was not obliged to file an application for special leave to appeal which had little or no prospect of success. By pursuing proceedings in the Federal Magistrates Court and an appeal in the Federal Court, Mr Taha exhausted all available and effective domestic remedies to challenge the validity of the Tribunal's decision. In any event, it is no longer open to Mr Taha to file an application for special leave to appeal, more than 28 days after the judgment of the Federal Court was pronounced.[15]

19. Further, in so far as the Tribunal's decision involved errors of fact, such errors are not amenable to correction in judicial review proceedings.

20. The Australian Government asserts that Mr Taha can seek orders "that the Minister intervene in his case and substitute a more favourable decision".[16] This statement is contrary to judicial precedent. The grounds on which a court can review the Minister's refusal to consider the exercise of his powers under s.417 of the *Migration Act* are extremely limited.[17] In particular, the court could not compel the Minister to exercise the discretion to substitute a more favourable decision for the Tribunal's decision. Accordingly, there is no available and effective domestic remedy in relation to the Minister's refusal to consider the exercise of his powers under s.417 of the *Migration Act*.

21. The Australian Government also claims that the domestic remedy of *habeas corpus* remains available to Mr Taha. It is not clear how proceedings for *habeas corpus*, challenging the lawfulness of Mr Taha's detention, would of themselves provide a remedy for a contravention of article 7 of the ICCPR arising from the threatened removal of Mr Taha to Syria. In any event, for the reasons set out below, the remedy of *habeas corpus* is not an available or effective remedy in relation to the alleged breaches of the ICCPR.

22. In its submission, the Australian Government states that Mr Taha has not "offered *prima facie* evidence that such remedies are ineffective or that an application for review would

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[14] *Judiciary Act 1903*, s.35A.

[15] See rule 41.02 of the High Court Rules 2004. The Court has power to dispense with compliance with this time limit.

[16] Australian Government's Submission, para 25.

inevitably be dismissed, for example, because of clear legal precedent." As discussed above,[18] the Committee has adopted the approach in its previous jurisprudence that the State party has the burden of establishing that the complainant has not exhausted all available and effective domestic remedies.

Article 9: Arbitrary detention

23. The Australian Government submits that the domestic remedy of *habeas corpus* remains available to Mr Taha and is an effective domestic remedy for the alleged breach of article 9(1) and 9(4).

24. Proceedings for *habeas corpus* can only address the issue of the lawfulness of Mr Taha's detention under domestic laws. As has previously been found by the Committee, "the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice".[19] Similarly, "court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law".[20]

25. Accordingly, in so far as the detention of Mr Taha in accordance with the provisions of the *Migration Act* amounts to a contravention of article 9 of the ICCPR, the remedy of *habeas corpus* is not an available or effective domestic remedy in respect of that contravention.

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[17] See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Applicants S134/2002* (2003) 211 CLR 441 at [44]-[48] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ, [98]-[100] per Gaudron and Kirby JJ.

[18] See paragraph 15.

[19] *A v Australia*, Communication No 560/1993, para 9.2.

[20] *Ibid*. para 9.5.

26. As the Committee observed in *Bakhtiyari v Australia*:[21]

> "As to the proposed remedy of *habeas corpus*, the Committee observes, as it has done previously, that as the State party's law provides for mandatory detention of unlawful arrivals, a *habeas corpus* application could only test whether the individuals in fact possess that (uncontested) status, rather than whether the individual detention is justified. Accordingly, the proposed remedy has not been shown to be an effective one, for the purposes of the Optional Protocol. The Committee thus is not precluded under article 5, paragraph 2(b), of the Optional Protocol from considering the communication."

27. Similarly, in *Baban v Australia*,[22] the Committee stated:

> "As to the author's claims under article 9, the Committee notes that the State party's highest court has determined that mandatory detention provisions are constitutional. The Committee observes, with reference to its earlier jurisprudence, that as a result, the only result of *habeas corpus* proceedings in the High Court or any other court would be to confirm that the mandatory detention provisions applied to the author as an unauthorized arrival. Accordingly, no effective remedies remain available to the author to challenge his detention in terms of article 9, and these claims are accordingly admissible."

28. Further, as acknowledged by the Australian Government in its submission,[23] the High Court has recently upheld the constitutional validity of the relevant provisions of the *Migration Act* requiring unlawful non-citizens to be kept in immigration detention until removed from Australia.[24] As he has not been granted a visa, Mr Taha has at all times been an unlawful non-citizen within the meaning of the *Migration Act*, and therefore is unable to challenge the lawfulness of his detention under domestic law.

29. The Australian Government has cited the Committee's views in *Lennon Stephens v Jamaica*[25] in support of the proposition that "if a remedy of *habeas corpus* is available, then a person who fails to take advantage of this right cannot be said to have been denied the opportunity to have the lawfulness of his or her detention reviewed in court without delay in

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[21] Communication No 1069/2002, para 8.2.

[22] Communication No 1014/2001, para 6.6.

[23] Australian Government's Submission, para 83.

[24] *Al-Kateb v Godwin* [2004] HCA 37; (2004) 208 ALR 124; see also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36.

[25] Communication No 383/1989, para 9.7.

violation of article 9(4)".[26] The author in *Lennon Stephens* had been convicted of murder and sentenced to death. One of his complaints related to a delay of 8 days between his arrest and detention and his being cautioned and informed of the charges against him. IN addition to claims in relation to articles 9(2) and (3), he alleged that his rights under article 9(4) had been violated "as he was not afforded in due course the opportunity to obtain, on his own initiative, a decision on the lawfulness of his detention by a court of law".[27] It may be observed that the Committee found this claim to be admissible.[28] However, when considering the merits of the claim, the Committee concluded:

> "With respect to the alleged violation of article 9, paragraph 4, it should be noted that the author did not himself apply for *habeas corpus*. He could have, after being informed on 2 March 1983 that he was suspected of having murdered Mr. Lawrence, requested a prompt decision on the lawfulness of his detention. There is no evidence that he or his legal representative did so. It cannot, therefore, be concluded that Mr. Stephens was denied the opportunity to have the lawfulness of his detention reviewed in court without delay."

30. The situation considered by the Committee in *Lennon Stephen v Jamaica* is distinguishable from the claims made by Mr Taha in the Communication. In *Lennon Stephens*, the author alleged that he had effectively been denied an opportunity to take proceedings to obtain a decision by a court on the lawfulness of his detention. The Committee found that he could have sought judicial review of the lawfulness of his detention, but had failed to do so. In the present case, Mr Taha claims that his detention pursuant to the provisions of the *Migration Act*, although lawful as a matter of domestic law, is contrary to the provisions of article 9(1) and (4) of the ICCPR. Analogous circumstances were directly considered by the Committee in the *Bakhtiyari* and *Baban* cases, discussed above.

Other domestic remedies

31. I am unable to identify any other judicial remedies available to Mr Taha under domestic law either in respect of his detention, or in respect of his potential removal from Australia and refoulement to Syria.

Conclusion

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[26] This submission appears to go to the merits of the alleged contravention of article 9(4), rather than its admissibility.

[27] Communication No 383/1989, para 3.4.

[28] Communication No 383/1989, para 6.6.

32. For the reasons set out above, the domestic remedies which the Australian Government submits are available to Mr Taha are either not available or would not be effective to address the alleged contraventions of articles 7 and 9 of the ICCPR. There is no longer any domestic remedy available by which Mr Taha could obtain orders for his release from detention, or to prevent his removal from Australia pursuant to the relevant provisions of the *Migration Act*.

2 February 2005

Chris Horan

Joan Rosanove Chambers

Annexure B

From: Walid Saffour (SHRC.ORG) [walid@shrc.org]

Sent: Sunday, 30 January 2005 1:26 AM

To: LIVLAS Manager

Subject: Re: Syrian Ayslum Seeker - Urgent Assistance Needed

Dear Sir / Madam

Thank you for your inquiry and the questions put forward to the Syrian Human Rights Committee in respect of the asylum seeker Mr. S.

1. In order to give a more comprehensive image about the case, let me start by demonstrating that the Syrian border ports are usually run by two separate groups of security authorities: the first group is the civil police who belong to the "Ministry of the Interior". This group enjoys minor and secondary powers when compared to the second group which is comprised essentially from the Military security and intelligence services.

Passengers could be stopped for the mere suspicion or a resemblance with someone else's name. Some innocent people have been kept in prison for months or even years for the suspicion or due to a mistake committed by an immigration officer. Under the pretext of the law of emergency dominant in Syria since 1963, intelligence and security services enjoy huge power and authority, while the rule of the law has nothing left to do.

On the other hand, the Syrian authorities take tough and illogical measures to prevent citizens from travelling abroad. They require for example permission from the employing department, the Military Intelligence services and the Military Conscription Branch. It is too arduous to get the permission from all of them. Failure to do so will result in denying the citizen the right to get a passport. To obtain an exit visa, similar permissions are requested. Citizens who leave the country without having such permissions are considered breaching the law and will be arrested upon their return. Mr. Abdel Rahman Al-Moosa returned from the USA on 19/1/05 after losing his appeal to stay there. He was arrested upon his arrival at Damascus Airport. Omar Oksh was also arrested on 10/12/05 upon his return from Sudan where he works. Mr. Khalid Ra'ei returned to Syria and was arrested at the first check point, he is still in prison after eight months of his arrest. Many instances are included in the reports and calls delivered last year by SHRC.

2. Syria endorsed the treaty against torture and cruel and inhuman treatment, however, they are still routinely practised in Syria by the Security and Intelligence Authorities.

Moreover, there is legislation in Syria that exempts security officers and intelligence employees from liability whilst executing their duties. This means that if a detainee dies under torture or because of cruel treatment or becomes permanently damaged, no one will be held responsible for their injury.

Therefore, I am sure that if Mr. 'S' is repatriated to Syria, he will be arrested upon his return, and will be subjected to torture, degrading, cruel and inhuman treatment in addition to indefinite detention. The world has read about the case of the Syrian-Canadian Maher Arar. SHRC had got confirmed information about the torture Mr. Arar received at a Palestine Branch, so it provided a statement to his wife which helped her in the campaign to release him from the Syrian jail. After his release, Arar held a press conference in which he talked in detail about the cruel and inhuman torture he and other detainees were subjected to at the Palestine Branch where they were confined in isolation of the outer world in underground filthy damp cells.

SHRC reported last year the death of some detainees because of the cruel and inhuman treatment in the Syrian detention centres. Palestinians are no exceptions. Many Palestinians, especially from factions at odd with the Syrian regime have been arrested and kept in prisons for many years. Many of them have vanished while in prison.

3. The Syrian regime supported and even sponsored the split among the Palestinian factions which led to the formation PFLP-GC, whose leaders currently live in Damascus and run their activities from the Syrian controlled areas in Syria and Lebanon. The bilateral co-ordination and co-operation between PFLP-GC and the Syrian Secret Services is an unconcealed issue. PFLP-GC is known for its merciless attitude towards its opponents.

4. SHRC has not documented recent cases due to its rarity at present, but we know of other similar cases that took place in the eighties and nineties. The more important issue is that there is no difference between PFLP-GC and the Syrian Secret Services because the former usually hands over its opponents to the latter to prosecute them or to cast them in prison if an issue in concern takes place in Syria.

Walid Saffour
Speaker
SHRC

----- Original Message -----

From: LIVLAS Manager <mailto:manager.livlas@vicbar.com.au>

To: justice@shrc.org <mailto:justice@shrc.org>

Sent: Friday, January 28, 2005 5:58 AM

Subject: Syrian Ayslum Seeker - Urgent Assistance Needed

Dear Sir/Madam

I am part of a team of lawyers in Melbourne, Australia that have been invited by the UNHCR in Geneva to put forward a communication on behalf of an asylum seeker "Mr S", currently in detention in Australia. The original communication was made to the UN on 23 January 2004. In October 2004, the Australian Government made its submissions in response. We now have until 10 February 2005 to submit comments in response to the State party's observations.

Mr S is stateless Palestinian born in Syria. On 11 October 2000 he arrived in Australia without travel documentation and in March 2001 lodged an unsuccessful application for a protection visa under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. After appeals to the RRT and the Full Bench of the Federal Court, Mr S was advised that he had no grounds for an application for leave to appeal to the High Court of Australia.

We are currently collating factual evidence that will support Mr S's claims that if he is deported to Syria his rights under Article 7 of the International Covenant of Civil and Political Rights ("ICCPR") will be infringed.

Background to Claim

The primary grounds for the alleged victim's claims are as follows:

a) Mr S is a stateless Palestinian born in Syria. He claims that he joined the PLO in 1986 and the People's Front for the Liberation of Palestine General Command ("PLFP-GC") about a year after he had finished his compulsory military training. He claims that the PLFP-GC works closely with the Sryian government and enjoys its support.

b) Mr S claims that he was forcibly sent on a mission to Lebanon in March 2000. Although he was not briefed on the details of the mission he believed it would involve terrorist activities. He did not want to be involved in such activities as by this stage he supported the fledgling peace process between Israel and the Palestinian Authority.

c) Mr S abandoned his duties 3 days after arriving in Lebanon and went into hiding. He claims that he was hiding in Lebanon for 7 months. He obtained a false Palestinian Authority and used it to return to Syria for 3 days to farewell his family. He then travelled to Indonesia from Bahrain and then arranged transport by boat to Australia. On arrival in Australia on 11 October 2000 he was placed in detention and has been there ever since.

d) Mr S claims that if he returns to Syria he will face immediate detention for leaving illegally. He also believes that the Syrian authorities would hand him over to the PLFP-GC who would imprison him indefinitely and possibly kill him. He claims the PLFLP-GC have a close relationship. He also claims that the PLFP-GS would be able to execute him with impunity. He is adamant that he would face long term imprisonment or even death if he returned to Syria.

Australian Government Response

a) The Australian Government has argued that the original communication did not provide evidence that persons who leave Syria illegally are likely to be detained upon their return. They also submit that there is no evidence to suggest that if in fact, Mr S is detained upon his return to Syria that he will be subjected to torture or to cruel, inhuman or degrading treatment. On that basis, the Australian Government therefore submits that they will not be in breach of Article 7 of the ICCPR if Mr S is deported.

b) It is also asserted that evidence gathered by DIMIA indicates that attempts by Syrians to gain asylum in another country is unlikely to result in the punishment of a returnee to Syria.

c) The Australian Government also claims that there is insufficient evidence to support the assertion that Syrian authorities co-operate with the PFLP-GC and are likely to hand Mr S over to the PFLP-GC who could imprison him indefinitely or execute him.

Questions for the Syrian Human Rights Committee

In order to refute these claims and provide weighty evidence as to the specific dangers Mr S would face if deported, we are seeking information on the following issues:

1. Is there recent evidence to suggest that persons who leave Syria illegally are likely to be detained upon their return?

2. Is there a real possibility that if Mr S was detained that he would be subject to torture, degrading treatment and indefinite detention?

3. What evidence and sources are there to demonstrate the relationship between the PFLP-GC and the Syrian government?

4. Have there been previous recorded cases of the Syrian government handing over people to the PLFP-GC?

As mentioned above, this information is needed as soon as possible.