OUTSOURCING RESPONSIBILITY:
A case Study of Australia's Practice of Outsourcing Immigration Detention Centres

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ABSTRACT

Privatisation processes, including outsourcing arrangements are altering the very conception of governance. The drive to privatise is advocated as streamlining governance, by making it more cost efficient, creating more choice and encouraging competition. However, other voices warn that privatisation and outsourcing leads to a lack of transparency and accountability which ultimately fosters environments conducive to violating human rights.

Since the inception of private actors gaining control of Immigration Detention Centres in Australia, there has been consistent calls for the State to retake control and management. In 2009 the Australian government claimed that it was not in a position to return Immigration Detention Centres to State control, due to the inability of the public sector to provide detention services. Also it was claimed that the State would be to exposed to compensation claims by private actors who had already commenced tendering to provide immigration services. This raises concerning questions about the government's capacity to protect asylum seekers and whether the State has become overly reliant on the private sector to provide governmental functions.

This thesis focuses on outsourcing arrangements regarding Immigration Detention Centres involving Australia, within Australian and extraterritorially and seeks establish as to whether the State can be attributed responsibility for the actions of private actors and International Organisations.
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INTRODUCTION

Privatisation and outsourcing arrangements can fundamentally alter the nature of the State and its ability to govern and simultaneously discharge its human rights obligations. Functions that were once considered to be governed solely by the State, are now becoming more frequently controlled and regulated by the private sector. The deprivation of liberty that results from the detention of people, is one function that governments are delegating through privatisation processes. This process should be regulated with a high degree of transparency and accountability. What is particularly concerning is when vulnerable groups within society are managed by private contractors in an environment where there is a lack of protection given by a State. Asylum seekers today comprise one of the most maligned and persecuted groups in the world and are increasingly being detained by States and subsequently controlled by private contractors. Questions arise as to whether States' responsibilities shift if those functions are delegated to private actors. Subsequently does this diminish the protection of the human rights of asylum seekers, if they are controlled by private actors within Immigration Detention Centres?

Transparency therefore plays a crucially important role in maintaining a link of accountability between the State and private actors. Nevertheless when actions are conducted 'out of sight', do they also result in being 'out of mind' as well? From the outset the practice of processing asylum claims extraterritorially creates a system where the intercepting State\(^1\) becomes reliant to a degree on the processing State to properly protect the rights of the asylum seekers. Many issues arise as to which State is responsible under International Law, Refugee Law and Human Rights Law and whether the human rights of asylum seekers are being effectively protected. What further complicates this already complex conundrum is when extraterritorial processing is outsourced.

\(^1\) Intercepting State, is used to refer to a State that has intercepted asylum seekers and transferred them to another State to have their asylum claim processed.
This thesis analyses the situation when Immigration Detention Centres have been outsourced to private actors and to an International Organisation extraterritorially. This circumstance took place simultaneously when the Australian government implemented both processes of outsourcing Immigration Detention Centres firstly to private actors within Australia and secondly to an International Organisation extraterritorially from 2001 until 2007. This thesis is therefore concerned with ascertaining as to whether the State can be held responsible for the actions of private actors and International organisations when they outsource Immigration Detention Centres.

**Research Question**

Therefore the pertinent questions raised are;

1. *When can a State be held responsible, under International Law, Refugee Law and Human Rights Law, for the actions of a private actor when Immigration Detention Centres are outsourced?*

2. *When can a State be held responsible, under International Law, Refugee Law and Human Rights Law, for the actions of an International Organisation?*

**Relevance of Topic**

This thesis is important because it addresses two complicated situations involving the outsourcing of Immigration Detention Centres. This thesis is particularly relevant because;

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2 Australia processed asylum seekers extraterritorially from 2001 until 2007 in what is commonly referred to as the 'Pacific Solution'. Chapter 3 discusses the pacific solution in detail. Australia is still outsourcing Immigration Detention Centres within Australia to private actors.

3 As defined by the draft articles on the responsibility of International Organisations for Internationally Wrongful Actions. Chapter 3, section 4.6 discusses this aspect.
1. It discusses the emerging trend of privatising the governmental function of migration detention and seeks to establish the human rights ramifications.

2. It seeks to establish if the State can be held responsible when it outsources migration detention offshore and to International Organisations. This is an area with much uncertainty, as it is an uncommon practice. Therefore numerous legal and human rights issues are ventilated.

**Methodology**

1. **Single Case Analysis**

   This thesis focuses on Australia's policy with respect to the outsourcing of Immigration Detention Centres firstly, within Australia to private contractors and secondly, offshore to the International Organisation for Migration in PNG and Nauru.

   The Australian example provides a unique case where a State;

   1. Has outsourced all of its Immigration Detention Centres;
   2. Has operated Immigration Detention Centres offshore in the past;
   3. Is reconsidering re-implementing the offshoring of Immigration Detention Centres in the future; and
   4. Has outsourced Immigration Detention Centres extraterritorially to an International Organisation.

   Therefore by providing a in-depth analysis of the Australian situation regarding the issues outlined above, this thesis covers a broad range of issues within the confines of a single case study.

   Nevertheless this thesis retains significance beyond Australia, in that the general conclusions reached shall be relevant universally. Therefore the Australian case serves as a 'test case' for other States considering outsourcing arrangements to private actors.
and in an extraterritorial manner.

2. **Interpretation of the Applicable Law**

Relating to the discussion of sources of International law, this thesis follows a legal methodological approach. Accordingly Article 38.1 of the Statute of the International Court of Justice is referred to;

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognised by civilised nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

For international conventions and treaties, interpretation is structured by Article 31 of the *Vienna Convention on the Law of Treaties*;

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument
related to the treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

3. Primary Sources
This thesis accordingly analyses various legal instruments from a legal methodological approach for interpretative purposes. In addition, in order to establish the factual circumstances of Australia's contractual relationships with private actors, it is necessary to glean information from various sources including, Australian legislation, transcript evidence from parliamentary hearings and Memoranda of Understanding between Australia and PNG/Nauru.

4. Secondary Sources
Taking into account the difficulty in ascertaining information regarding Australia's contractual arrangements with private actors running Immigration Detention Centres and its International arrangements with PNG, Nauru and the International Organisation of Migration, much attention is paid to various institutional sources, such as Australian Senate parliamentary hearing reports, in conjunction with submission reports made before parliamentary inquiries by the Australian Human Rights Commission, UN bodies and various other civil society groups.

Current Literature

The literature on the responsibilities of the State following outsourcing arrangements of
Immigration Detention Centres is limited. There is growing legal analysis in relation to State responsibility and extraterritoriality, nevertheless there is scant literature which discusses the responsibility of the State when outsourcing arrangements are made extraterritorially by the State with International Organisations. Therefore this thesis is unique and seeks to contribute in some way by shedding light on the complexities relating to outsourcing arrangements and human rights concerns that arise when asylum seekers are detained by private actors and processed by an International Organisation.

**Scope of Thesis**

Due to the confines of this thesis and the broad range of issues raised it is necessary to narrow the scope of this thesis. This thesis therefore is not concerned with the laws of regional and domestic jurisdictions and refers solely to International Tribunals, Courts and other competent bodies.

With respect to Human Rights Law, this thesis is primarily concerned with the ICCPR, in particular Articles 7, 9 and 10 and the standard of due diligence. There are as a result many pertinent aspects of Human Rights Law, that are relevant but due to the scope of this thesis are not canvassed.

**Outline of Thesis**

This thesis is divided into three chapters, including the introduction. Both the second and third chapters are subdivided into two parts. Part A from both chapters outlays a detailed factual account. Part B then provides a legal analysis based on the facts and relevant legal instruments and jurisprudence. Both chapters address the issue of outsourcing Immigration Detention Centres.

Chapter two scrutinises the history of outsourcing arrangements of Immigration Detention Centres and focuses on the current contractual arrangement in place within
Australia and then analyses as to whether Australian can be attributed responsibility for the actions of the private contractor which is running Immigration Detention Centres in Australia.

Chapter three begins with Part A detailing the history of offshore processing of asylum seekers in what has been referred to as the 'Pacific Solution'. Attention is drawn to Australia's outsourcing arrangement with the IOM. Part B expands further by taking the facts established in Part A and providing legal analysis of the applicability of International Law, Refugee Law and Human Rights Law extraterritorially.
CHAPTER 1

Outsourcing of Immigration Detention Centres To Private Actors

1 Outline of Chapter

This chapter is separated into two parts. Part A analyses the phenomenon of privatisation and outsourcing in relation to Immigration Detention Centres (IDCs) and gives a detailed factual account. A close examination of Australia's experience with the outsourcing of IDCs is undertaken, by recounting the history of private actor involvement in the running of IDCs. This part focuses on the current contract between the Australian government and the current outsourced contractor, Serco. Criticisms and human rights concerns that have arisen in the wake of the outsourcing of IDCs are discussed. Part A therefore prepares the foundation for the legal analysis in Part B.

Once the contractual relationship between the Australian government and Serco has been addressed, Part B considers whether responsibility can be attributable to the State for the actions of private actors. This section is divided into two sub-sections; the first sub-section focuses on International law, by interpreting the ILC Articles on State responsibility for International wrongful actions and in particular Articles 5 and 8 to determine as to whether state responsibility can be attributed via the actions of private actors in general and more specifically relating to the outsourcing of IDCs in Australia. The second sub-section scrutinises the standard of due diligence, under both International law and International Human Rights law, to ascertain if States can be held responsible for the actions of private actors.
PART A

2 Definitions

*Privatisation*

Privatisation is the process by where assets of the State are sold along with the right to produce and sell associated services.\(^4\) The process of privatisation makes something private that was previously owned by the public sector. Privatisation is often used to describe a process of removal of public authorities from the operation of an institution or service.\(^5\) Nevertheless if the State retains ownership over the property, for example an IDC, complete privatisation has not taken place.

*Outsourcing*

Outsourcing arrangements, such as private operators engaged to run IDCs in Australia, do not involve the State selling assets but the State retains ownership of the infrastructure and the private contractor is paid to provide services to the State. Accordingly what distinguishes outsourcing from fully fledged privatisation is that the State is responsible for the construction, design and funding of the infrastructure and, does not entail selling the ownership of the State's property.\(^6\) It is noted that IDCs in Australia have been in the past and are currently being outsourced. Nevertheless for the purposes of this thesis, due to the common usage of the term *privatisation* in reference to the process of *outsourcing*, both terms are used interchangeably.\(^7\)

\(^4\) English, 2006, p. 251.
\(^5\) De Feyter, & Gomez Isa, 2005, p. 1.
\(^6\) Ibidem.
\(^7\) Outsourcing is often referred to as being part of the privatisation process. Nevertheless it is misleading to refer to the privatisation of IDCs, when they have been outsourced. Public-Private Partnerships (PPPs) are distinct from both privatisation and outsourcing arrangements. In PPPs the private contractor owns the infrastructure for the duration of the contract that has been entered into with the State and is contracted to provide services to the State. Normally at the expiration of the
3 Neo-liberalism and Privatisation Processes

Neo-liberalism is a term that refers to a form of political economic governance that advocates a minimalist state, and that markets should organise economic activity as opposed to Keynesian welfarism which holds the State as being responsible for the provision of goods and services. Neo-liberalism is concerned with encouraging competition, economic efficiency, choice and in conjunction with a shift towards deregulation of the market, privatisation is considered as the preference over the welfare state.

In light of the increasing movement towards privatising sectors of the State, according to Clapham it is no longer clear what the traditional role of the State is. McBeth argues that privatisation has shifted the State's primary role to a supervisory duty to protect human rights. The process of neo-liberalisation has resulted in the restructuring of traditional core functions of the State through the involvement of private actors as they become involved in the governing process and the relation between public and private is reconfigured, as Lenke explains;

The so-called 'retreat of the state' is in fact a prolongation of government, neo-liberalisation is not the end but a transformation of politics, that restructures the power relations in society. What we observe today is not a diminishment or a reduction of state sovereignty and planning capacities but a displacement from formal to informal techniques of government and the appearance of new actors on the scene of government.

contract, the ownership of the assets reverts to the State. In Australia all IDCs have been outsourced to private contractors. In this thesis at times various sources are used that refer to the term privatisation instead of the proper term, which is outsourcing to describe the process that is taking place in Australia.

8 Larner, 2000, p. 5.
9 Larner, 2000, pp. 5 – 6.
10 Clapham, 2006, pp. 8 – 12.
12 Lemke, 2005, p. 11.
Menz argues that outsourcing as a phenomenon is more likely to occur in States where 'neoliberalisation is most advanced'.\textsuperscript{13} He warns that once privatisation processes are implemented, self-reinforcing dynamics are created and 'lock in effects' materialise.\textsuperscript{14} Menz also argues that privatisation processes in IDCs that have taken place in the three Anglo-American countries, namely Australia, UK and USA, all have bipartisan support for the implementation and maintenance of these systems, as centre-left governments have barely modified privatisation processes. This suggests that powerful lock in effects have been created.\textsuperscript{15} Interestingly it is asserted that privatisation processes are also partly influenced by financial and political blame avoidance strategies\textsuperscript{16} and that far from the State conceding a loss of power over migration control, engaging private actors is a method adopted by States to reinforce its control over the 'State migration management apparatus'.\textsuperscript{17}

The UK is cited as a State that experienced long lasting effects of outsourcing to private actors, caused primarily due to the financing and contractual arrangements entered into which are 'designed to lock in governments' with private contractors, 'that are impossible to disentangle during the course of such contracts'.\textsuperscript{18} Section 2.1 discusses the Australian example in more detail and argues that the Australian government has been locked in by its outsourcing arrangements.

4 Global overview of privatised/outsourced IDCs

As at 2009 there were sixteen States that had employed private contractors in some form within IDCs.\textsuperscript{19} The types of private actors that have been contracted to provide services

\begin{flushleft}
\textsuperscript{13} Menz, 2011, p. 3. \\
\textsuperscript{14} Ibidem. \\
\textsuperscript{15} Menz, 2011, p. 29. \\
\textsuperscript{16} Menz, 2011, p. 3. \\
\textsuperscript{17} Ibidem. \\
\textsuperscript{18} Menz, 2011, p. 20. \\
\textsuperscript{19} Flynn & Cannon, 2009, p. 4. The sixteen States are Australia, Canada, the Czech Republic, Estonia, Finland, France, Germany, Ireland, Italy, Japan, Luxembourg, Portugal, South Africa, Sweden, United Kingdom, and the United States. In Denmark the Red Cross have been engaged to operate and administer most non secure accommodation centres for asylum seekers, whose cases are being reviewed by the Danish Immigration Service. For further commentary relating to the involvement of
\end{flushleft}
within IDCs varies greatly. In Portugal and France, not-for-profit organisations have been engaged by the respective governments to provide a range of services including legal and psychological counselling.20 The Red Cross has been contracted by the Italian government to provide health services in IDCs and in Germany, small private security firms have been providing small scale management services.21

Sweden provides an interesting example of a State that has returned control of IDCs to the public sector after the private actors involved in the running of the IDCs received widespread criticism. Up until 1997, Sweden's four IDCs were run by the Federal Police, who in turn sub-contracted out the running of the IDCs to private security firms. Nevertheless by the mid 1990s, civil rights groups openly criticised reported instances of violence, hunger strikes and suicide attempts within IDCs.22 As a result the Swedish government ordered an inquiry into the management of IDCs, leading to substantive reforms, which included reverting control of IDCs back to the public sector and transferring responsibility of the administration and management of IDCs from the Federal Police to the Migration Board.23

Today the Refugee Council of Australia has cited the 'Swedish Model of Detention' as an exemplary method which is considered to be the preferable alternative to outsourcing arrangements used in Australia.24 Furthermore in 2009 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, referred to Sweden as a model country for its treatment of immigrants in IDCs.25

5 Outsourcing Migration Detention in Australia

the Red Cross in operating non secure accommodation facilities in Denmark refer to http://www.globaldetentionproject.org/de/countries/europe/denmark/introduction.html.
21 Ibidem.
The following section is divided into two sub-sections. The first sub-section addresses the history of the outsourcing IDCs in Australia from 1997 through to 2009 as well as identifying various concerns and criticisms that have been made by various bodies during this period. The second sub-section discusses the current outsourcing arrangement between the Australian government and Serco in more detail as this is necessary prior to discussing in Part B as to whether responsibility can be attributed to the State for the actions of a private actor.

6 History of Outsourcing IDCs in Australia 1997 - 2009

6.1 Australasian Correctional Management (ACM) 1997 – 2003

In 1996 the Coalition government, announced that it intended to privatise the operations of Australia's IDCs to ensure more flexible and cost effective services. Until the end of 1997 security services in IDCs were managed by Australian Protective Services on behalf of The Department of Immigration, Multiculturalism and Indigenous Affairs (DIMIA). In February 1998 Australasian Correctional Services Pty Ltd (ACS) was formally contracted for the provision of detention services. ACS and

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26 The government that was in power from 1996 until 2007 was formed by a Coalition between the Australian Liberal Party and the Nationals Party. John Howard was the Prime Minister of Australia during this period.
28 Australian Protective Services is a federal government agency.
29 The Department's name has undergone numerous changes. From 1996-2001 the name was the Department of Immigration, Multicultural Affairs (DIMA), from 2001-2006 the name was the Department of Immigration, Multicultural and Indigenous Affairs, from 2006-2007 the name reverted to the Department of Immigration, Multicultural Affairs (DIMA) and from 2007 to date the name has been the Department of Immigration and Citizenship (DIAC). Accordingly the acronym used in this thesis varies in relation to the above timeline.
30 ACS is a joint venture between Wackenhut Corrections Corporation Australia and Thiess Pty Ltd. Thiess was involved because it was initially envisaged in the original proposal that infrastructure development would be possible in the future. ACS also sub-contracted Pacific Rim Employment Pty Ltd to provide staff for the detention facilities. Pacific Rim Employment Pty Ltd in 1998 was a wholly owned subsidiary of Wackenhut Corrections Corporation Australia. For ease of reference, for the remainder of this thesis ACM is used to refer to both ACS and ACM. Refer to Australian National Audit Office, Management of the Detention Centre Contracts – Part A, 2003 – 2004 paras. 2.33 – 3.5.
DIMIA entered into a contract, which stipulated that ACS was to provide services at eight detention facilities and entered into an occupation licence agreement that authorised ACS to use the detention facilities. Australasian Correctional Management Pty Ltd (ACM) was sub-contracted by ACS as the operational company for an initial period of three years with an option for renewal. The Detention Services contract with ACM ran for six years in total.

**ACM: Concerns and Criticisms**

As detailed in the Commonwealth's Ombudsman's Report of 2001, in the years following privatisation and outsourcing of services within IDCs, multiple problems emerged such as overcrowding, proliferation of self harm and depression. In addition the Flood Report which was ordered by the Minister for Immigration and Multicultural Affairs, to focus on allegations of child abuse within IDCs, uncovered systemic problems and deficiencies and noted that urgent attention was required to address defects in the administration and management of the detention facilities.

In reaction to the serious concerns raised in the Ombudsman's and the Flood Reports, the Human Rights and Equal Opportunity Commission (HREOC) developed the Immigration Detention Guidelines so as;

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32 ACS was contracted to provide detention facility services at Port Hedland Villawood, Maribyrong, Perth, Woomera, Curtin, Baxter and Christmas Island.  
37 The Human Rights and Equal Opportunity Commission (HREOC) changed its name in 2008 to the Australian Human Rights Commission (AHRC). The AHRC is the official National Human Rights Institution and is mandated by the Paris Principles to promote and protect human rights in Australia. It is currently accredited with 'A' status by the International Coordinating Committee of National Human Rights Institutions.
...to facilitate further dialogue and cooperation among the Commission, detention authorities (DIMA and ACM) and relevant non-governmental agencies in the development of acceptable minimum standards for immigration detention in Australia.\textsuperscript{38}

Nevertheless the government failed to codify the guidelines to entrench them in national legislation, which diminished its impact in strengthening human rights protective mechanisms for detainees in IDCs. DIMIA claimed to have used the detention guidelines as a reference in developing Standards to outline the quality of services to be provided by future private operators of detention centres.

\textbf{6.2 Global Solutions Limited (GSL) 2003 - 2009}

At the expiration of the contract between the Australian government and ACM, a new contract was signed with Group 4 Falck Global Solutions Pty Ltd (G4S)\textsuperscript{39} on 27 August 2003,\textsuperscript{40} for an initial period of four years. Following the signing of the contract G4S was renamed Global Solutions Limited (GSL). The contract was based on the standards developed by DIMIA after consulting HREOC and according to DIMIA the agreement entailed greater attention to the provision of health and psychological care for detainees, in that GSL was required to 'take responsibility for the security, custody, health and welfare of detainees delivered into its custody by DIMIA'.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{38} Human Rights and Equal Opportunity Commission, 'Immigration Detention Guidelines', 2000, p. 3.
\item \textsuperscript{39} G4S (formerly Group 4 Securicor) is a multinational conglomerate which was created in 2004 when British Securicor, Danish Falck and Swedish Securitas merged. It has its headquarters based in London and according to its website is the world's largest security company, employing 625,000 people in over 120 countries. In 2009 it was reported to have an annual turnover of 8 billion euro. G4S has varied and numerous subsidiary companies relating to security, such as defensive and protective services (Armorgroup, Progard Securitas), prisons (Wackenhut Services), outsourced justice services (GSL). For the purposes of this thesis, GSL is the relevant company that was involved in the running of IDCs.
\item \textsuperscript{40} The Parliament of the Commonwealth of Australia, Immigration detention in Australia, Third report of the Inquiry into immigration detention in Australia, Joint Standing Committee on Migration, 2009, para. 3.22.
\item \textsuperscript{41} The Parliament of the Commonwealth of Australia, Immigration detention in Australia, Third report of the Inquiry into immigration detention in Australia, Joint Standing Committee on Migration, 2009, para. 3.23 – 3.24.
\end{itemize}
GSL: Concerns and Criticisms

Nevertheless according to the Public Interest Advocacy Centre, conditions did not improve as complaints about the standards in IDCs continued after GSL had taken over the contract with evidence of the continued existence of ‘defective practices and abuses of human rights in immigration detention centres’.42

The Palmer Report43, which was investigating the circumstances which led to the detention in an IDC of Ms Cornelia Rau who is an Australian citizen, found that;

The current detention services contract with Global Solutions Limited is fundamentally flawed and does not permit delivery of the immigration detention policy outcomes expected by the Government, detainees and the Australian people.44

In addition an independent review of the Detention Services Contract in 2006, which was conducted by Mick Roche, found that the government’s contractual arrangement with GSL required alterations and that DIMIA was required to improve its management and monitoring of the contract.45 As a result of the Roche review DIMIA announced that it intended to re-tender all detention services.46

In June 2005 five NGOs47 lodged an international complaint against GSL to the OECD National Contact Point in the UK and Australia.48 The submission made numerous
allegations\textsuperscript{49} against GSL to the effect that GSL was complicit in human rights violations relating to detainees in IDCs which led to an investigation and mediation.\textsuperscript{50} After the mediation process had taken place a statement was released outlining GSLs \textit{voluntary} agreement to acknowledge that it has responsibilities and should be held accountable for the following:\textsuperscript{51}

1. to make reference to human rights standards in contract renegotiations;\textsuperscript{52}
2. to enhance training of staff with human rights a focal point of training programmes;\textsuperscript{53} and
3. to seek external advice in the monitoring of a human rights compliance unit.\textsuperscript{54}

Nevertheless despite GSL undertaking to implement significant changes to enhance human rights observance of its operations within IDCs, their contract was not renewed.

\textbf{6.3 \textit{A New Direction}?}

In 2006 prior to The Australian Labor Party (ALP) taking over as the government at the 2007 federal election, Tony Burke MP\textsuperscript{55} described GSL as 'the private company that has people coming in the doors with no mental health problems and going out as broken human beings',\textsuperscript{56} and also proclaimed in January 2006 that privatisation of IDCs 'was a...
bad idea from the start. It should not have taken place. It should not be continued'.

In the midst of intense scrutiny by civil society and the media of the continual findings of malpractice within IDCs, the ALP whilst in opposition, advocated that 'the length and conditions of detention must be subject to review, and detention centres managed by the public sector' in its 2007 Charter. This signalled a strong rebuke of the practice of outsourcing migrant detention facilities in Australia.

**6.4 Key Immigration Values**

After the ALP had won office, the then Minister for Immigration and Citizenship, Chris Evans signalled the intention of the Australian government to venture in a *New Direction*, when in July 2008 he outlined the government's plan to move away from the Coalition government's 'punitive policies' and proclaimed that the ALP rejected the notion that 'dehumanising and punishing unauthorised arrivals with long-term detention is an effective or civilised response'. He outlined the government's seven key immigration values as follows;

1. Mandatory detention is an essential component of strong border control.
2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention;
   A. all unauthorised arrivals, for management of health, identity and security risks to the community.
   B. unlawful non-citizens who present unacceptable risks to the community.
   C. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an IDC.

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59 Evans, Chris., 'New Directions in Detention: Restoring Integrity to Australia's Immigration System', Speech at Australian National University, Canberra, 29 July 2008.
4. Detention that is *indefinite or otherwise arbitrary is not acceptable* and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.

5. Detention in IDCs is only to be used as a *last resort* and for the *shortest practicable time*.

6. People in detention will be treated fairly and reasonably within the law.

7. Conditions of detention will ensure the inherent dignity of the human person.\(^{60}\) (own emphasis)

Nevertheless, despite the ALP making a pre-election promise to revert the running of migrant detention centres to public control if it won office, in January 2009 it extended the contract of GSL until at least July 2009. Furthermore it was announced that it intended to allow the retendering process commenced by the Coalition government in 2007, to proceed and that it would decide on the successful tender application in July 2009.\(^{61}\)

### 6.5 Lock in Effects

The then Minister for Immigration and Citizenship, Chris Evans explained the rationale for breaking ALPs pre-election promise to return the management and control of IDCs to the public sector, when he stated;

> The absence of alternative public service providers would require the extension of the current contract arrangements for a minimum of two years. The cancellation of the tender process would expose the Commonwealth to potential compensation claims from the tenderers...The broader policy issues of public versus private sector management of detention services will be addressed following an evaluation at the end of the term of the contracts concluded as part of the tender process.\(^{62}\)

\(^{60}\) Ibidem.


\(^{62}\) Evans, Chris., 'New Directions in Detention: Restoring Integrity to Australia's Immigration System', Speech at Australian National University, Canberra, 29 July 2008.
Chris Evans subsequently announced on 1 July 2009 that it had reached an agreement with Serco to provide services within IDCs for the sum of $370 million. Senator Hanson-Young in response to the government's announcement stated that;

Outsourcing is not an appropriate way of handling the claims and care of these vulnerable people seeking our assistance and protection, particularly when some of the detention facilities are so remote from the Australian mainland. Accountability and transparency are key to making sure human rights and justice are respected in Australia's immigration processes.63

The alleged inability of the government to return the running of IDCs to the public sector raises serious concerns about whether the State is able to prevent possible human rights violations taking place within IDCs. Furthermore, as discussed in section 1.3, the consequences of privatisation and the outsourcing may be durable and the explanation given by the Australian government not to take over the running of IDCs demonstrates that 'lock-in effects' have materialised in Australia. The government claimed that the public sector was not in a position to take over the running of IDCs for a period of two years. This indicates that the government has become reliant on private actors to serve a function that it traditionally controlled and that the public sector has lost expertise in this field. Subsequently the ability of the government to effectively monitor human rights violations is diminished, if ultimately it cannot take over the responsibilities of managing detention facilities.

7 Serco 2009 - Current

In this section the government contract with Serco to run IDCs is analysed, focusing on allegations of a lack of transparency of Serco's operations, so as to be in a position to

later determine in Part B, as to whether the Australian State can be attributed responsibility for the actions of Serco. As stipulated earlier, the responsibilities of Serco are outside the scope of this thesis, as this paper is concerned only with State responsibility. Nevertheless due to the lack of information relating to the Serco contract available to the public, it is necessary to closely scrutinise parliamentary hearings, Senate estimates\(^{64}\), reports and inquiries to elucidate the relationship between the government and Serco. Media reports are utilised to contextualise the concerns expressed about the lack of transparency in relation to Serco.

**Contract Details**

On 29 June 2009, DIAC entered into a five year contract with Serco Australia Pty Ltd\(^{65}\) to run IDCs in Australia. The transition period from the previous private contractor, GSL, was completed in November 2009.\(^{66}\) On 11 December 2009 a further contract was entered into with Serco to provide services to people within immigration residential housing and immigration transit accommodation.\(^{67}\) According to DIACs website,\(^{68}\) the Serco contract has incorporated the *Key Immigration Detention Values*, detailed in section 2.1 of this chapter, and included recommendations from the Palmer report.\(^{69}\) Nevertheless no specific details apart from scant and general information is given to the public about the Serco contract.

**Licence Agreement**

Pursuant to the contract, Serco assumed a full licence for the running of IDCs. The responsibilities assumed by Serco pursuant to the licensing agreement means that Serco 

\(^{64}\) A senate estimate hearing is the procedure where the Senate examines the proposed budget of the federal government and is empowered to ask questions to representatives of government departments. 

\(^{65}\) Serco is a service and outsourcing company that has over 70,000 employees globally. 

\(^{66}\) Australian Immigration Fact Sheet 82 – Immigration Detention, p. 5. 

\(^{67}\) Ibidem.


\(^{69}\) See footnote 41 above, relating to the nature of the Palmer Report.
has full responsibility for the infrastructure and for the facilities for the duration of the contract. All the assets of the detention facilities are licensed to Serco, whom is required to have adequate and appropriate insurance, which is monitored by DIAC. The insurance is to cover any damage sustained to the facilities. Nevertheless Serco is liable only up to $75 million, because the insurance arrangement has been capped at this sum.

7.1 **Serco: General Concerns and Criticisms**

**Breaches of Contract**

According to witness statements given by DIAC representatives during Senate Estimates hearings, Serco has been abated on numerous occasions by DIAC for breaches of contract. Nevertheless the contract is structured in a complicated way that does not enable DIAC to record breaches per incident but it has a series of abatements that apply to certain metrics. However the list of items that would qualify as a breach of contract is considered to be *commercial-in-contract* and is not publicly disclosed. When Senator Hanson-Young questioned representatives of DIAC as to what was the rationale for not disclosing the list of items that would qualify for breaches of contract, Ms Lynch-Magor responded;

The abatements regime is naturally something which is very commercial for the service provider

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70 Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 44.
72 Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 44.
74 The Department's representative, Ms Lynch-Magor explained the complex abatement structure as follows; 'With the way the contract is structured it does not record breaches per incident but it has a series of abatements that apply to certain metrics. Month by month, in the event that Serco are unable to meet all of the things that they need to meet at every centre in the contract, they are abated for those. So they have been abated since the beginning of the contract after they passed acceptance testing. But it is not in a recordable number, as in X number of breaches this financial year, because of the way that the abatements work'. Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 21.
75 Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 22.
76 Department of Immigration and Citizenship, Onshore Detention Network, Acting First Assistant Secretary, Infrastructure and Services Management.
Serco. It indicates a degree of commercial performance – they are concerned. Some of those things go to the security of the centres and some go to the operational detail at the centres, which would not be appropriate to have in the public domain.\textsuperscript{77}

DIAC has confirmed that Serco since 2009 has breached terms of the contract on many occasions. Nevertheless the actual items that would constitute a breach are not available to the public. The rationale provided by a representative of DIAC insinuates that the interests of Serco to keep certain information out of the public domain outweigh the public interest of transparency and accountability. Consequently, it is reasonable to conclude that the Australian government is more concerned about its commercial relationship with Serco rather than upholding the rights of detainees within IDCS, as it is a logical inference that without greater transparency of the Serco contract, there is a greater possibility of human rights violations taking place.

Senator Hanson-Young detailed the concerns over the lack of transparency of the contract when she summarised the details that are not disclosed;

\begin{quote}
So the contract and the list of requirements that Serco have to fulfil are not publicly disclosed. The possible items that would qualify as breaches are not publicly disclosed. Their service delivery performance, whether they are upholding or breaching, is not publicly disclosed. Where in this process is the public interest and transparency of this contract? It does not exist, does it? If it is up to Senate estimates then we need to see those things tabled. If it is not available for public disclosure, there is no transparency in this process. Yet we know that up to $1 billion is estimated in the forward estimates to run these facilities. Yet there is no public discourse.\textsuperscript{78}
\end{quote}

\textit{Serco Staff and confidentiality agreements}

Pursuant to the terms of the contract, Serco is required to ensure that all staff members do not comment to the media.\textsuperscript{79} Despite this aspect of the employment contract there have been recent cases of \textit{whistleblowers} contacting the media to express their concerns

\textsuperscript{77} Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 23.
\textsuperscript{78} Ibidem.
\textsuperscript{79} Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 49.
of the conditions within the IDCs and the lack of training for staff members. It has been alleged that Serco staff members are advised not to formally report incidents that arise, so that Serco is not held liable for potential breaches of the contract. An anonymous guard advised that it was common practice to destroy reports of incidents involving detainees, by sending it to 'Bin 13' which is code for the shredder. Furthermore it has been revealed that Serco has upgraded unauthorised media presence at detention centres as being 'critical' and at the same security warning level as a bomb threat. This disproportionate behaviour exhibited by Serco to equate of the existence of the media in close proximity to IDCs with the grave seriousness of a bomb threat, reveals its intention to block out media scrutiny. Furthermore it has been alleged that staff members who have been suspected of leaking information to the media have been threatened by Serco.

Lack of training for Staff

The AHRC has found staff to be inadequately trained within IDCs, and in a particular example, not one staff member at Leonora detention facility was trained in the psychological support training programme, despite it being a required qualification. A former employee of Serco made allegations that Serco had failed to properly train staff at Villawood detention centre and had cancelled a six week induction course, meaning that some staff had very limited training. Furthermore it has been alleged that Serco have been artificially inflating the numbers of staff purported to be working on Christmas Island. It was claimed by a whistleblower that 'they're not on the island, but they're on the roster'.

80 Lateline, 'Guard blows the whistle on detention centre conditions', ABC, 5 May 2011 accessed from www.abc.net.au/lateline/content/2011/s3209164.htm on 5 May 2011.
85 ABC News, 'Unauthorised media on par with bomb threats:Serco', 18 May 2011, accessed from
Serco and subcontractors

MSS Security and Resolve FM have been sub-contracted by Serco to provide services pertaining to the provision of security in IDCs. It has already been established that it is extremely difficult to gain detailed information in relation to the Serco contract. Furthermore, by allowing Serco to enter into sub-contractual agreements, it creates a further link in the chain of responsibility away from the Australian government. It was reported that a MSS security officer was caught in bed with a detainee in a detention facility in Darwin and another MSS security officer physically assaulted a detainee. DIAC have stated that Serco is only obligated to advise DIAC about major sub-contracts that are worth more than $1 million in total to seek prior approval of the contract, but if the sub-contract is minor and less than $1 million, Serco is not obligated to disclose this information. Accordingly this raises doubts as to whether DIAC is sufficiently able to monitor the actions of minor sub-contractors.

8 DIAC

At this point it is useful to analyse the role of DIAC and to establish certain responsibilities. DIAC is responsible for a diverse range of services which includes the enforcement of immigration law. The Migration Act 1958 sets out the migration laws which the Minister for Migration and Citizenship administers. One of the key outcomes that are detailed in DIACs plan is to;

89 DIACs key outputs and responsibilities include: 1 – Migration and temporary entry, 2 – Refugee and humanitarian entry and stay, 3 – Enforcement of immigration law, including effective border security, 4 – Safe haven, 5 – Offshore asylum seeker management, 6 – Settlement services, 7 – Translating and interpreting services, 8 – Australian citizenship, 9 – Promoting the benefits of cultural diversity. The Department of Immigration and Citizenship, Fact Sheet 3, Accessed from http://www.immi.gov.au/media/fact-sheets/03department.htm on 6 June 2011.
Protect refugees and contribute to humanitarian policy internationally. Uphold Australia's convention obligations through rigorous assessment of asylum claims against immigration law, and promote the development of innovative and responsive humanitarian policies internationally.\textsuperscript{90}

DIAC purports to ensure that services outsourced are provided in a 'fair, reasonable and humane manner, through implementing performance standards in each contract which are focused on service outcomes to people in detention'.\textsuperscript{91} In addition DIAC undertakes that performance standards are monitored through 'robust performance' management.\textsuperscript{92} Nevertheless criticisms, which are raised in the following section, from the AHRC, and the UN's Asia-Pacific representative of the UN High Commissioner for Human Rights, repudiate the contention that DIACs contractual arrangements fulfil its own 7 Key Immigration Values mentioned in section 2.1, uphold Australia's International obligations, or adequately monitor performance standards of outsourced private actors.

8.1 **DIAC - General Concerns and Criticisms**

**Auditor - General**

The Auditor – General is an independent officer of the Australian parliament, who is responsible, under the *Auditor – General Act 1997*, for auditing public sector entities, including DIAC. The Auditor – General's role is to carry out independent assessments about public sector financial reporting, administration and accountability.\textsuperscript{93} In 2004 the Auditor – General undertook an extensive performance audit of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). It was acknowledged that the initial contract in 1997 with ACM was entered into at a time when the


\textsuperscript{91} Ibidem.

\textsuperscript{92} The Department of Immigration and Citizenship, Fact Sheet 3, accessed from http://www.immi.gov.au/media/fact-sheets/03department.htm on 10 June 2011.

Australian public sector had limited experience in large-scale outsourcing arrangements with the private sector which contributed to many deficiencies in the Department's ability to effectively monitor the performance of ACM. The Auditor – General made numerous recommendations, which were agreed to be implemented, for DIMIA to make improvements by;

1. Addressing risks in a more systematic manner, involving a comprehensive risk assessment which includes risk identification, treatment, analysis, monitoring and review.\(^\text{94}\)

2. Documenting its strategies for detention service function and develop a robust contract management plan.\(^\text{95}\)

3. Undertaking sound research into immigration detention service.\(^\text{96}\)

8.2 **Human Rights Concerns**


The AHRC has published numerous reports regarding IDCs and the treatment of detainees.\(^\text{97}\) In 2000 HREOC drafted the Immigration Detention Guidelines, which


draw on relevant international minimum standards, detailing what is required for the humane detention to be consistent with International Human Rights obligations\textsuperscript{98} with a particular focus on the *International Covenant on Civil and Political Rights* (1966), the *Convention on the Rights of the Child* (1989) and non-binding international instruments.\textsuperscript{99} When HREOC invited the Australian government to comment on the Guidelines, the relevant government department advised that they had already a set of Immigration Detention Standards which are articulated in outsourced contracts.\textsuperscript{100}

There are several independent bodies that are granted permission to monitor conditions within IDCs in Australia.\textsuperscript{101} However AHRC reported in 2008 concerns that they have not been empowered with a legislative mandate to access IDCs;

The Commission does not have a specific statutory power to enter immigration detention facilities, although in practice it has been provided with access. The Commission's statutory powers that allow it to monitor conditions in immigration detention do not explicitly extend to monitoring Australia's compliance with its obligations under the Convention against Torture (although some of these obligations are reflected in other human rights treaties to which the Commission's powers apply). And, while the Commission has a statutory power to investigate complaints regarding alleged human rights breaches in detention facilities, the Commission's

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\textsuperscript{99} The relevant non-binding international instruments are the; *Declaration on the Rights of Disabled Persons 1975; Standard Minimum Rules for the Treatment of Prisoners 1955; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988; United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990; Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers 1999.*


\textsuperscript{101} The bodies include the Australian Human Rights Commission (AHRC), the Immigration Detention Advisory Committee (IDAG), the Detention Health Advisory Group (DeHAG), the Commonwealth Ombudsman and the United Nations High Commissioner for Refugees (UNHCR).
recommendations in these cases are not legally enforceable.\footnote{102}

In addition it is noted that AHRC was denied access to visit the IDCs based on Nauru and PNG, when the Australian government was processing asylum seekers offshore from 2001 – 2007 as part of the 'Pacific Solution'\footnote{103}. The Joint Committee on Migration, which was ordered to investigate the practices taking place within IDCs, recommended in 2009 that the AHRC 'be granted a statutory right of access of all places of, and persons in, immigration detention in Australia'.\footnote{104} As at 1 July 2011, AHRC has not been granted this right by statute.

After reviewing immigration detention in Australia in 2008, the AHRC made recommendations to the Australian government including the following;

\textbf{1. Monitoring of standards in Immigration Detention:}

\begin{itemize}
  \item [A.] Minimum standards for conditions and treatment of detainees, which should be based on relevant international human rights standards, should be codified in legislation.\footnote{105}
  \item [B.] The Australian government should accede to the Optional Protocol to the Convention against Torture and establish an independent National Preventive Mechanism responsible for conducting regular inspections of IDCs.\footnote{106}
\end{itemize}

\textbf{2. Length and uncertainty of Detention} – Australia should repeal mandatory detention laws.\footnote{107}

\footnote{103}The 'Pacific Solution' is discussed in more detail in chapter 3.
\footnote{104}The Parliament of the Commonwealth of Australia, Immigration detention in Australia, Third report of the Inquiry into immigration detention in Australia, Joint Standing Committee on Migration, 2009, para. 4.58
\footnote{106}On 19 May 2009, Australia signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Australia has not yet ratified the Optional Protocol. In 2009 the Australian government stated that it intended to ratify the Optional Protocol by 2010 and establish a National Preventive Mechanism by 2012.
\footnote{107}The Australian Government in 2011 continues to maintain its commitment to mandatory immigration detention as 'an essential component of strong border control', in Australian Government, Department of Immigration and Citizenship, 'Response to the Australian Human Rights Commission Statement on Immigration Detention in Leonora, 2011, p. 1. It is noted that the Executive Committee of the United
3. **Staff training** – DIAC should ensure that all staff are adequately trained in relation to the human rights of detainees.\(^{108}\)

4. **Use of Restraints** – DIAC and the outsourced private operator should review procedures regarding the use of restraints on immigration detainees to ensure restraints are only used when absolutely necessary.\(^{109}\)

5. **Children in Detention** - Australia should comply with the *Convention on the Rights of the Child* (1989) and ensure that there should be a presumption against the detention of children in IDCs and must be a measure of last resort and for the shortest practicable period of time.\(^{110}\)

The AHRC has noted in its 2011 report that despite the Australian government's purported reliance of the *Key Immigration Values* as discharging its international obligations, in practice the values have not been implemented.\(^{111}\) The *Key Immigration Values* have not been enshrined in Australian legislation and therefore the rights of detainees under International law, Refugee law, International Human Rights law are diminished.

**UN Bodies**

1. **UN – Report of Justice Bhagwati 2002**\(^{112}\)

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After inspecting the operational detention facilities in Woomera\textsuperscript{113} and the Baxter detention centre\textsuperscript{114} Justice Bhagwati outlined Australia's obligations pursuant to International Human Rights Law that are relevant when considering the rights of detainees in IDCs, including the following:

A) International Covenant on Civil and Political Rights (ICCPR)

1. Article 9 prohibits arbitrary detention and recognises the right to take legal proceedings to challenge the lawfulness of detention.

2. Article 7 prohibits torture and all cruel, inhuman and degrading treatment and punishment.

3. Article 10 which requires that detained persons be treated with humanity and respect for human dignity.\textsuperscript{115}

It is noted that these articles are all expressed in Article 37 of the Convention on the Rights of the Child.\textsuperscript{116}


Similar observations were made by the WGAD relating to Australia's obligations under the ICCPR. However the WGAD made very interesting comments on the ramifications of the privatisation of IDCs on the legal status of detention. At the time that the delegation visited and inspected Woomera detention centre, the private contractor running the IDC was ACM.\textsuperscript{117} The WGAD highlighted the contradiction between the delegated exercise of authority to ACM that is 'usually the prerogative of public powers' on one hand and the other, the 'profit motive'.\textsuperscript{118} WGAD cited numerous examples of prerogatives of public powers that were exercised by ACM, being:

1. Carrying out surveillance of detainees.

\textsuperscript{113} The Woomera immigration detention centre was operational from 1999 to 2003 when it was closed.
\textsuperscript{114} At the time of the visit from both Justice Bhagwati and the Working Group of the Commission on Human Rights on Arbitrary Detention, the Baxter immigration detention facility was not operational.\textsuperscript{115} Bhagwati, 2002, p. 13.
\textsuperscript{116} Chapter 3 examines in more detail Australia's obligations pursuant to the ICCPR.
\textsuperscript{117} Refer to section 2.1 of this thesis, which relates to ACM.
2. Exercising the power to discipline.

3. Maintaining order

4. Determining as to whether legal representatives are granted permission to visit detainees.\textsuperscript{119}

The delegation outlined its concern for the outsourcing arrangement of IDCs in Australia and stated;

This is a case of prerogatives normally reserved for the public powers being exercised by a commercial company, recruited by tender and therefore according to the laws of the market, whose purpose, notably in response to pressure from its stockholders, is to realize profits through a contractual relationship with the State. This explains why, when the delegation was refused a copy of ACM's contract, representatives of the company invoked, to the delegation's astonishment, "business secret", not "State secret", the State was regarded as an ordinary "client".\textsuperscript{120}

Therefore, according to the WGAD, clear aspects of governmental authority were exercised by ACM. This aspect is important when considering as to whether the Australian State can be attributed responsibility for the actions of private entities contracted to run IDCs. Further ventilation and analysis on this point is made in Part two of this chapter, relating to the ILC Articles for State Responsibility and in particular article 5.

8.3 \textit{DIAC's Response to criticism}

The government's response in 2011 to AHRC's statement on immigration detention in Leonora, encapsulates the government policy on mandatory detention and related issues surrounding IDCs and the treatment of detainees. In brief the government has reiterated that it;

1. Is committed to the policy of mandatory detention.

2. Disputes that mandatory detention violates Article 9 (1) of the ICCPR, as

\textsuperscript{120} Ibidem.
detention of asylum seekers is both reasonable and necessary in all the circumstances to carry out security checks.

3. Disputes that it violates Article 9 (4) of the ICCPR, which relates to the rights to habeas corpus, as judicial review need to be available to consider the lawfulness of detention in the context of domestic law, rather than issues of arbitrariness.\textsuperscript{121}

4. The Australian government is committed to the key immigration values and is implementing these values.\textsuperscript{122}

8.4 \textit{Civil Society Concerns}

\textit{Transparency and Visibility}

Submissions were made by various organisations that the privatisation of IDCs had hindered accountability and transparency\textsuperscript{123} and The Australian Council of Heads of Social Work stated their concerns of the privatisation process and that the contractual framework discouraged transparency;

\begin{quote}
    The privatisation of detention centres and the imposition of fines for failing to meet standards created a conflict of interest for both the private operators and the department to accurately report on the condition of detention.\textsuperscript{124}
\end{quote}

The Brotherhood of St Laurence stated their opinion that outsourcing of the management of IDCs 'obscured the division of responsibility for upholding human rights standards and international law with regards to detention'.\textsuperscript{125}

\begin{flushleft}
\textsuperscript{121} Chapter 4.2.6.2 discusses the ICCPR in more detail. \\
\textsuperscript{122} Australian government, Department of Immigration and Citizenship, 'Response to the Australian Human Rights Commission Statement on Immigration Detention in Leonora, 2011, pp. 1 – 3. \\
\textsuperscript{123} The Parliament of the Commonwealth of Australia, Immigration detention in Australia, Third report of the Inquiry into immigration detention in Australia, Joint Standing Committee on Migration, 2009, para. 3.103. \\
\textsuperscript{124} The Parliament of the Commonwealth of Australia, Immigration detention in Australia, Third report of the Inquiry into immigration detention in Australia, Joint Standing Committee on Migration, 2009, para. 3.104. \\
\textsuperscript{125} The Parliament of the Commonwealth of Australia, Immigration detention in Australia, Third report of the Inquiry into immigration detention in Australia, Joint Standing Committee on Migration, 2009,
\end{flushleft}
In 2008 DIAC advised that;

Immigration detention is subject to continuing scrutiny from a number of external parties to ensure that people in immigration detention, including in immigration detention centres, are treated humanely, decently and fairly.\textsuperscript{126}

Nevertheless numerous civil society organisations strongly contest DIACs assertion that IDCs receive appropriate forms of scrutiny. The Refugee Council of Australia submitted that;

Commercial-in-confidence requirements have shielded detention centres from the level of public scrutiny required to ensure that detainees have their rights respected and their dignity maintained as well as affecting the level of public confidence in the extent to which the government is adequately discharging its duty of care to detainees.\textsuperscript{127}

\section{Summary of section}

This section briefly addresses the global phenomenon of involving private actors in the administration and management of IDCs. It notes that Sweden has been lauded as a 'model State' for its treatment of asylum seekers and was sufficiently concerned with the involvement of outsourced contractors that it reverted the control of IDCs to the State. Australia has a long history of concerns relating to the treatment of detainees within IDCs. Nevertheless despite strong criticisms being levelled at the Australian government from various bodies concerning the outsourcing of IDCs, it has been established that the Australian government is suffering from 'lock in effects' as demonstrated by its inability to take over the control of IDCs in 2009.

\footnotesize
\begin{itemize}
\item \textsuperscript{126}Department of Immigration and Citizenship, submission 129, 11 September 2008, p. 15.
\item \textsuperscript{127}The Parliament of the Commonwealth of Australia, Immigration detention in Australia, Third report of the Inquiry into immigration detention in Australia, Joint Standing Committee on Migration, 2009, para. 4.65.
\end{itemize}
This section highlights the scant amount of information available to the public relating to the Serco contract and consequently the serious lack of transparency with respect to the government's arrangement with Serco. Accordingly, doubts as to whether the Australian government is sufficiently protecting the human rights of detainees within IDCs are raised.
PART B
Outsourcing Immigration Detention Centres and State responsibility

10 Outline of section

In this section state responsibility is analysed generally when states outsource traditional governmental functions to private actors and more specifically in relation to the Australian government outsourcing IDCs. Within the Australian context, the issue as to whether the Australian State can be held responsible for the actions of Serco and its sub-contractors, is examined in detail. Therefore an interpretation of the International Law Commission's Articles on State Responsibility is undertaken, focusing on Articles 5 and 8. Secondly the concept of 'due diligence' is analysed as a way to bridge the responsibility gap that may arise, if the ILC Articles prove insufficient to establish State responsibility for the actions of private actors.

11 Private actors exercising governmental authority

ARTICLE 5

Conduct or persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

11.1 Analysis of Article 5 and commentary
Article 5 was intended to take into account the increasing phenomenon of 'para-statal' entities, which exercise elements of governmental authority, substituting State organs, as well as where state corporations have been privatised but still retain a regulatory role.\textsuperscript{128} Entity is a generic term that according to the commentary to Article 5 can represent public corporations, semi-public bodies and in exceptional cases private corporations on the basis that they;

1. have been empowered by national law to exercise functions of a public nature;
2. the conduct of the entity is related to the exercise of governmental authority.\textsuperscript{129}

The commentary gives an example of a private security firm being empowered by contract to act as prison guards thereby fulfilling the first criteria and secondly carrying out their role which entails the exercise of governmental authority, being the power to detain, discipline and regulate prisoners.\textsuperscript{130} The commentary stipulates that it is not decisive as to whether the entity;

1. is categorised by national law as being public or private in nature;
2. is owned in full or in part by the State; or
3. is subject to the executive control of the State.

The important feature is that the entity is empowered to exercise elements of governmental control.\textsuperscript{131} The justification for attributing the conduct of the entity to the State under International Law is due to the conferral of power in national law to the entity of some element of governmental authority.\textsuperscript{132} Nevertheless it is clear that the scope of responsibility of the State for the actions of a private entity is limited to the exercise of governmental authority and not for other commercial activity of the entity.

\textsuperscript{128}ILC Articles, Commentary to article 5, para. 1.
\textsuperscript{129}ILC Articles, Commentary to article 5, para. 2.
\textsuperscript{130}ILC Articles, Commentary to article 5, para. 2.
\textsuperscript{131}ILC Articles, Commentary to article 5, para. 3.
\textsuperscript{132}ILC Articles, Commentary to article 5, para. 5.
which does not encompass governmental authority.\textsuperscript{133}

Article 5 is however silent on defining precisely the meaning and the scope of 'governmental authority'. The commentary stipulates that what is regarded to be 'governmental' is dependant on the particular society and that its history and traditions must be taken into account before determining its meaning.

\textit{11.2 Travaux Préparatoires}

Although the \textit{travaux} does not guide us as to the precise meaning of 'governmental authority' it is useful to seek further clarification of the intention of the drafters of the Articles. The Preparatory Committee of the Hague Conference requested that States provide further information relating to private institutions exercising elements of governmental authority. Germany, amongst other States, made a reference to these entities carrying out governmental authority as 'public territorial units', claiming that the acts of these entities should be attributed to the State.\textsuperscript{134} This led to further discussions, which stipulated that the actions and omissions of autonomous institutions that exercise public functions of an administrative or legislative nature attribute responsibility to the State, if the actions and omissions are contrary to the State's international obligations.\textsuperscript{135} Therefore the \textit{travaux} suggests that 'governmental authority' encompasses an autonomous institution that exercises administrative or legislative public functions.

\textit{11.3 International case law}

At the end of World War Two, the Franco-Italian Conciliation Commission was established to examine as to whether attribution of actions of non-state entities could be

\textsuperscript{133}Ibidem.

\textsuperscript{134}Report of the ILC, 26\textsuperscript{th} Session, \textit{ILC Yeabook 1974}, Vol. II(1), 281.

made to the Italian State. In the matter of *Dame Mossé* the Commission found that the Italian State could be found responsible for the actions of a non-state entity, which were attributable. It was found that international law is concerned with the situation that effectively and positively exists within a State regarding as to whether the entity exercises public prerogative powers or not.

The Iran-United States Claims Tribunal followed this reasoning in the *Hyatt* case, where the Tribunal found that the seizure of goods of foreigners by a charitable foundation could attribute responsibility to the Iranian State, on the basis that the Iranian government had empowered the entity to exercise governmental authority. In addition in the *Nicaragua* case the ICJ was concerned with entities, referred to as 'Unilaterally Controlled Latino Assets', and as to whether they could be considered to have been empowered to exercise elements of governmental control. The Court found that the actions of the entities could be attributable to the United States and furthermore Judge Ago in his separate opinion alluded to the ILC Articles, by stating that:

> the Court was also right to consider as acts of the United States of America the conduct of persons or groups that, without strictly being agents or organs of the State, belong nevertheless to public entities empowered within its domestic legal order to exercise certain elements of the government authority.

Therefore the ICJ confirmed the centrality as the entity being empowered by national

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136 *Dame Mossé*, 7 January & 6 October 1953, 13 *RIAA* 486, 493.
137 The Commission was concerned with a matter that involved the confiscation of goods from a French citizen and as to whether the actions of the non-state entity, which happened to be a Fascist entity which was restored in the Republic of Saló, which lasted from 1943 – 1945.
138 Ibidem.
142 The CIA referred to 'Unilaterally Controlled Latino Assets' as being persons paid by the United States to act under the instructions of US military personnel and intelligence services.
law to carry out a function that would pertain to be governmental authority. As already observed, 'governmental authority' is not defined by the ILC Articles, but it is noted that 'governmental' is dependant on the particular society. Therefore it is necessary to look at the history of IDCs in Australia to determine as to whether 'governmental' encompasses the running of IDCs. As referred to in section 2.1, IDCs were run by the public sector up until 1997, when the Howard government outsourced the running of IDCs for the first time to ACM. Up until 1997 IDCs were operated and controlled by the Australian State.

This would demonstrate that, in the Australian context, historically and traditionally, 'governmental' would be encompassed in relation to its meaning within Article 5, and would include the running of IDCs, which involve the detention, discipline and regulation of asylum seekers. Therefore following this line of reasoning, Serco has been authorised by the Australian government to carry out functions, in the day to day management and control of IDCs, that can be categorised as 'governmental authority' and reach the high threshold established in Article 5.

11.4 Application to Serco

As stipulated in the Auditor – General's audit report of 2005/2006,\textsuperscript{144} when the former Department of Immigration and Multicultural Affairs sought to outsource the provision of services for the running of IDCs it was required by law to comply with the \textit{Financial Management and Accountability Act 1997} (FMA Act) and the \textit{Financial Management and Accountability Regulations 1997} (FMA Regulations) which govern the management of Commonwealth money and property.\textsuperscript{145} Pursuant to the FMA Act, the Chief Executive of the Agency, meaning the Head of the Department, is empowered to enter into contracts and arrangements on behalf of the Commonwealth of Australia.\textsuperscript{146}

\textsuperscript{144}The Auditor – General, Audit Report No. 32 2005 – 06, 'Management of the Tender Process for the Detention Services contract, Department of Immigration and Multicultural Affairs', Australian National Audit Office.

\textsuperscript{145}The Auditor – General, Audit Report No. 32 2005 – 06, 'Management of the Tender Process for the Detention Services contract, Department of Immigration and Multicultural Affairs', Australian National Audit Office, para. 3.4

\textsuperscript{146}Section 44, \textit{Financial Management and Accountability Act 1997}, Regulation 8, Financial Management
In accordance with the FMA Regulations, an official is required to have regard to the Commonwealth Procurement Guidelines (CPGs) when performing duties in relation to the procurement of property or services. A core requirement of the CPGs is to ensure that 'Value for Money' is the key consideration when entering into agreements for the procurement of property or services.\(^\text{147}\) Therefore it is legislated that the Australian government must take as its priority, when entering into arrangements with private actors for the running of IDCs, the guideline of 'Value for Money', which reflects the liberal ideological perspective to seek cost efficiency in services. By placing economic considerations above those in the public interest for greater transparency and accountability, it is not surprising that the human rights of detainees are violated.

Although the FMA Act and Regulations do not explicitly empower private actors to exercise governmental authority, it must be noted that the national law permits the Australian government to enter into arrangements regarding the use of Commonwealth resources. As stipulated above at section 2.2, the Australian government entered into a licence agreement, which meant that Serco assumes responsibility for the assets of the IDCs for the life of the contract. It can therefore be deduced that the FMA Act and Regulations permit and empower the contracted party, Serco, to 'exercise governmental authority'.

Accordingly it would appear that the criteria outlined in the ILC Article 5 has been fulfilled, if a wide interpretation is taken, in that Serco has been indirectly empowered by national law\(^\text{148}\), and is authorised to carry out governmental authority relating to the detention, discipline and regulation of asylum seekers. Accordingly if a wide approach is adopted that the Australian government can be held responsible for the conduct of

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\(^{147}\)Department of Finance and Administration, Commonwealth Procurement Guidelines and Best Practice Guidance, September 2001. The Department is now referred to as the Department of Finance and Deregulation.

\(^{148}\)Section 44, Financial Management and Accountability Act 1997
Serco as it has been established that State attribution can be made for the actions of a private company.

Nevertheless it may be argued that the conditions of ILC Article 5 are not met, if a strict and 'narrow application' is taken. It is noted that Australian national law does not explicitly empower private actors to exercise governmental authority. As highlighted above the relevant national laws only empower the relevant State Department to effectively outsource services. If a narrow approach was adopted, it may be found that it is necessary to explicitly refer to private actors as being authorised to exercise governmental authority.

In light of the Australian government's response to the report of the AHRC Statement on immigration detention in Leonora\(^{149}\) it is likely that the government would assert that in line with the *key immigration values*, the government has discharged all its international obligations. However this argument is weak, as it has been highlighted in Part A that the government has been unable to put into practice these values. Also, due to the lack of information regarding the Serco contract, it is difficult to predict the government's defence to the submission that it can be attributed responsibility for the actions of Serco or another sub-contractor.

12 Private conduct authorised, directed or controlled by a State

*ARTICLE 8*  
*Conduct directed or controlled by a State*

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

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\(^{149}\) Refer to DIAC's response to criticism in section 2.3.
12.1 Analysis of Article 8 and State Responsibility

Unlike in Article 5, it is not necessary to evidence a *de jure* relation through domestic law but a *de facto* connection. As reiterated in the commentary, as a general principle, the conduct of private persons or private entities is not attributable to the State under International law. In addition to the circumstances that arise to attribute responsibility that has been established in Article 5, Article 8 exemplifies two exceptional cases where the actions can be attributable to the State, which are:

1. Where persons act on the instructions of the State when they carry out the wrongful action, and
2. Where a private person or a group of private persons act under the direction or control of the State.

It is clearly established under international law that the State will be attributed responsibility for actions carried out, if those actions have been authorised. As the commentary to Article 8 stipulates, in such cases it is not necessary that a person or persons carrying out the actions are private individuals nor whether their actions involve 'governmental activity'.

It is clear from the text of Article 8 and verified in the commentary that the three terms being, 'instructions', 'direction' and 'control' are disjunctive, thereby meaning it is sufficient only to prove the existence of one of the terms.

12.2 *Travaux Préparatoires*

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150 Article 8, ILC Articles, commentary, para. 1.
152 Article 8, ILC Articles, commentary, para. 2.
153 Article 8, ILC Articles, commentary, para. 7.
The formulation that was finally chosen for Article 8 was a compromise, in the sense that it was not too rigid so as to allow for different interpretations. James Crawford favoured a more subjective conception of attribution. The ILC has amended the wording of the Crawford draft to replace the 'and' between 'direction' and 'control' with 'or'. The criterion of 'control' therefore becomes independent from 'direction' and actually makes the final Article 8 less restrictive.

12.3 **International case law**

The *Nicaragua* case found that the United States was attributed responsibility for the actions of the *contras* which consisted of the 'planning, direction and support' given by the United States to the Nicaraguan contras, but rejected the broader claim made by Nicaragua that the United States had controlled all of the activities of the contras and stated that;

> For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

Despite the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case applying the doctrine established in the *Nicaragua* case, this was overturned in the Appeals Chamber, which found that;

> The requirement of international law for the attribution to States of acts performed by private

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154 James Crawford's draft was worded as follows; 'The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) The person or group or persons was in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct. Own emphasis. J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(I), 1,4.

155 *Contrás* is the name given to various Nicaraguan paramilitary groups that were supported by the US during the Nicaraguan civil war in the 1980s.


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individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. 159

Nevertheless the same issue faced the Trial Chamber again in the Bosnia Genocide160 case. The Tribunal clearly followed the rule in the Nicaragua case and repudiated the finding in the Tadić case and asserted that it is 'settled jurisprudence' concerning the effective control test established in the Nicaragua case.161

Therefore it can be asserted that the rule established in the Nicaragua case and reaffirmed in the Bosnia Genocide case maintains a very high threshold to be able to determine that a State can be attributed responsibility via control over a private person or private persons, for the actions of a private person or group of persons. Nevertheless the second situation is much more difficult to prove as to whether the activity of a private individual or private group was carried out under the 'direction or control' of the State and it is unlikely that if applied to the Australian's contract with Serco that the high threshold would be reached.

13 Due Diligence and Indirect State Responsibility for conduct of private actors

13.1 Outline of section

In this section we shall explore as to whether the standard of due diligence can be utilised to close the responsibility gap. The lacunae that arises if the ILC Articles, especially Articles 5 and 8, cannot be relied on to attribute responsibility to the State for

the conduct of private actors, can be circumvented by seeking recourse to the principle of due diligence. States have a duty to prevent human rights violations, which includes protecting a person or persons against the actions of non-state actors. Therefore due diligence does not require that the actions of a private actor be attributed to the State, but rather requires that the State exercise due diligence by preventing, investigating and providing remedies for human rights violations. Therefore case law within general international law and international human rights law is analysed below.

13.2 *General International case law*

In the *Corfu Channel*\(^{162}\) the ICJ affirmed the principle of due diligence when it held that Albania was responsible for 'grave omissions' when it had failed to remove mines in its territorial waters or at least warn foreign States of their existence and location.\(^{163}\) In the case of *United States Diplomatic and Consular Staff in Tehran*\(^{164}\) the ICJ found that Iran's conduct 'speak loudly and clearly' of Iran's breach of its responsibility of protection,\(^{165}\) when it failed to protect the diplomatic and consular staff of the US embassy in Tehran, when the embassy and the consulates in Tabriz and Shiraz were seized and the embassy staff were held hostage.

13.3 *Human Rights Jurisprudence*

The Human Rights Committee has affirmed the standard of due diligence when it adopted General Comment 31.\(^{166}\) The Committee asserted that States are obligated to take preventive measures to protect the human rights enshrined in the International

Covenant on Civil and Political Rights and stated that;

The positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities.167

Therefore the Committee affirmed that there may be;

circumstances in which a failure to ensure Covenant rights...would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.168

(own emphasis)

The Human Rights Committee in the matter of *Cabal and Pasini v Australia*169 related to a communication made by Mexican citizens who alleged that the Australian State breached Articles 7 and 10, due to the fact that they were imprisoned in a privately run facility awaiting deportation and not segregated from other inmates. The matter of relevance to this thesis, is that the Committee found that Australia maintained responsibilities even if a prison had been privatised or contracted out and stated;

The Committee considers that the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10.170

168 Ibidem. It is noted that the Human Rights Committee has accordingly endorsed the tripartite approach adopted by the Committee on Economic, Social and Cultural Rights, under the obligations of the State to 'respect, protect and fulfil' pursuant to General Comment 14 'The Right to the Highest Attainable Standard of Health, Article 12', adopted 11 May 2000, E/C.12/2000/4, para. 33.
170 Ibidem, para. 7.2 The Committee also cited *B.d.B v The Netherlands*, Communication No. 273/88, which found that a State party 'is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs'.

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Nevertheless it must be acknowledged that the Human Rights Committee has no binding effect and accordingly is only capable of making recommendations or suggestions.

14 Summary of Chapter 1

Part A analyses privatisation and outsourcing processes and shows the alteration of the traditional notion of governmental functions. As McBeth has indicated, the role of the State has shifted and now it has a heightened supervisory duty to ensure that private actors do not violate the human rights.\textsuperscript{171} Durable and long lasting effects can arise once governmental function have been privatised and or outsourced. It is argued in this thesis that the Australian government has become reliant on private actors to carry out the governmental responsibility of detaining asylum seekers and as a consequence lock in effects have materialised. Nevertheless as demonstrated by the Swedish case, it is possible for the government to return the administration and management of IDCs back to the control of the public sector and reinforce a 'model' system.

It is elucidated that there are serious concerns due to the lack of information available to the public regarding the details of the Serco contract. This lack of transparency is compounded by the paranoia of Serco, as is exhibited by its scaling of the presence of the media to the same level of a bomb threat. However of more concern are the questions that are being levelled at the government, as to whether it can be effectively held to account by the public for protecting the human rights of detainees.

Part B builds on the facts established in Part A and argues that a private company outsourced to run an immigration detention centre would sufficiently entail governmental authority, within the meaning of ILC Article 5. Furthermore if the private

\textsuperscript{171} McBeth, 2004, p 153.
contractor was empowered by national law, a State could be attributed responsibility for
the actions of the private contractor. Based on ILC Article 5, the human rights standard
of due diligence, and the information available in relation to the Serco contract, it would
appear that Australia can be attributed responsibility for Serco's actions in IDCs.
Nevertheless as discussed the threshold in Article 8 appears to be too high.
CHAPTER 2

Outsourcing Extraterritorial Processing

1 Outline of Chapter

Part A of this chapter begins by defining extraterritorial processing and detailing the history of its implementation in the United States as background information. Part A then focuses on the Australian experience with outsourcing extraterritorial processing, commonly referred to as the 'Pacific solution'. A detailed factual account of the Pacific solution is given with particular focus firstly on the processing arrangements reached between Australia and the processing States, being PNG and Nauru. Secondly the outsourcing arrangement between Australia and the IOM is examined. Similarly as structured in Chapter two, Part A outlays a factual account, providing relevant details to build a foundation for Part B to delve into the legal analysis.

Part B of chapter two discusses the legal implications of the outsourcing of extraterritorial processing under refugee law, general international law and international human rights law. As outlined in the introduction, the legal analysis is limited in scope. Therefore the areas of law that are primarily examined are Articles 31 and 33 of the Refugee Convention; Articles 7, 9 and 10 of the ICCPR; ILC Articles 16 and 17 on State responsibility for Internationally wrongful acts; and to a lesser extent the draft articles on the responsibility of International Organisations. This chapter is concerned with establishing the responsibility of the receiving State entering into the outsourcing arrangement, being Australia and not with the processing States.
PART A

2 Definition

Extraterritorial processing takes place when a receiving State uses the territory of another State with or without the assistance of an international organisation, for the purpose of processing asylum claims.

3 Background into Extra-territorial Processing

3.1 Extra-territorial Processing in the United States

Extraterritorial processing has a long history in the United States of America (United States), where in 1981 the Reagan administration first implemented a migration interdiction programme172 to prevent Haitian asylum seekers from reaching the territory of the United States, after it had been declared that the issue had become a 'serious national problem detrimental to the interests of the United States'.173 Pursuant to the interdiction programme, the US Coastal Guard were authorised to stop and board Haitian or unflagged vessels on the high seas approaching the United States, to be interviewed or screened. After the screening process took place, those persons seeking asylum who appeared to have a genuine fear of being persecuted in Haiti were permitted to travel through to the United States for processing, whereas the remaining asylum seekers were returned to Haiti.174

In 1991 the United States, under the Bush administration, altered the policy to establish a regional arrangement to attempt to resettle Haitian asylum seekers in neighbouring States. This policy was largely unsuccessful in gaining regional support and ultimately

173 Ibidem.
only 550 Haitians out of many thousands were resettled in other States.\textsuperscript{175} Due to the policy failure to resettle Haitian asylum seekers outside of the United States, the government initiated the first significant offshore processing centre, when it constructed a detention facility at Guantanamo Bay, to detain unsuccessful claimants from Haiti.

Former US President Clinton enlarged the offshore processing programme when in 1994 it was announced that interdicted asylum seekers from Cuba would also be held at Guantanamo Bay. Thereby the 'wet foot dry foot' policy was commenced, which meant that Cubans who reached the US mainland would continue to receive preferential treatment for asylum\textsuperscript{176}, whereas those intercepted at Sea, would be transferred to Guantanamo Bay.

In 1995 President Clinton's government agreed with Cuba to grant permanent refugee status to the Cubans detained at Guantanamo Bay on the basis that the United States would return all asylum seekers to Cuba from 2 May 1995, as long as they would not be persecuted on their return.\textsuperscript{177} The naval base at Guantanamo Bay is now subject to severe criticism as it is continuing to be utilised to detain suspected 'terrorists' by the United States government, despite President Obama pledging to close it down when he entered office in 2009.

4 The Pacific Solution of the Pacific Nightmare?

Diverting boat loads of people to detention centres in Nauru and Papua New Guinea in exchange for huge sums of money perpetuates the very trafficking of human misery that the Australian government claims it is seeking to prevent\textsuperscript{178}

\begin{footnotes}
\item[176] Pursuant to the Cuban Adjustment Act 1966, The United States granted Cubans priority immigration status if they escaped Cuba and sought asylum in the United States.
\item[177] Dastyari, 2007, p.97.
\item[178] Khan, 2002.
\end{footnotes}
On 26 August 2001, 433 mostly Afghan asylum seekers were rescued from a sinking boat by the crew of the Norwegian container ship MV *Tampa* en route from Indonesia to Australia. The Captain of the *Tampa* was heading for Christmas Island to allow the asylum seekers to disembark but was subsequently directed by the Australian authorities on 27 August 2001 to keep out of Australian territorial waters and to take the rescued passengers back to Indonesia. The captain, who had expressed concerns for the medical condition of some of the asylum seekers on board the *Tampa*, ignored the orders from the Australian authorities and proceeded for Christmas Island.

Australian Special Air Services (SAS) were then despatched and bordered the *Tampa* and took control of the ship. It is clear that pursuant to the Law of the Sea, there are obligations to rescue passengers on vessels in distress. However Australia argued that since Norway was the flag state of the *Tampa*, they bore the responsibility to decide which State was the 'nearest feasible port of disembarkation' but simultaneously asserted that the nearest port was Indonesia and not Australia.

UNHCR sought to assist the Australian authorities process the asylum claims of the Afghans stuck on the *Tampa*, on the basis that UNHCR would process the claims on

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179 Senate Select Committee on a certain Maritime Incident, 2002, p. 33.
180 The *Tampa* found a 20 metre wooden Indonesian fishing boat in distress in the Indian Ocean 140 kilometres north of Australia's Christmas Island. The fishing boat was within the Indonesian search and rescue zone, but was first sighted by the Coastwatch of the Australian Search and Rescue (AusSAR) which broadcast a call to ships in the vicinity of the fishing boat to offer assistance. The *Tampa*, which had a crew of 27 and was licensed to only carry 50 persons in total, responded to the call and rescued the asylum seekers from the fishing boat. These facts were gleaned from *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs (& Summary)* [2001] FCA 1297 (11 September 2001).
182 The Captain indicated that of the 438 people on board, 15 were unconscious, 1 child was sick, 1 person had a broken leg and a large group of people had open sores and skin infections, Answers to Questions on Notice, AMSA, 5 July 2002, p.9.
183 Afeef, 2006, p.5 (4.1)
184 Article 98 of the Convention on the Law of the Sea. Chapter 2.1.10 of the International Convention on Maritime Search and Rescue states that 'parties shall ensure that assistance be provided to any person in distress at sea. They shall so do regardless of the nationality or the status of such person or the circumstances in which the person is found'. Article 10 of the International Convention on Salvage provides that 'every master is bound so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.'
Christmas Island and if the claims were found to be legitimate, those refugees would be resettled in other western States.  

Australia rejected this proposal and reasserted its staunch position that no asylum seeker from the *Tampa* would set foot on Australian soil. On 1 September 2001 the Australian Prime Minister, John Howard, announced that New Zealand and Nauru had agreed to process the asylum seekers on the *Tampa*. The Prime Minister found an 'ad hoc' solution to the *Tampa* crisis, and now set out to institute a comprehensive new border protection regime, and so the 'Pacific solution' came into effect.  

In addition Prime Minister Howard gained political mileage from the Pacific solution and used it as a platform to seek re-election when he proclaimed that 'We will decide who comes to this country and the circumstances in which they come'.

### 4.1 Excision of territory

On 26 September 2001, the Australian Senate passed the *Migration Amendment (Excision from Migration Zone) Act No. 127 2001* and *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act No. 128 2001*, which defined certain Australian Islands as 'excised offshore places', which were subsequently excluded from the Australian migration zone. Furthermore legislative amendments meant that people who entered the newly created excised zone were no longer regarded as 'unlawful non-citizens' pursuant to legislation prior to the amendments, and were now classified as an 'offshore entry person'. Asylum seekers that entered excised Australian Islands...
territory would not have their claims for asylum processed in Australia. They were prohibited from bringing legal proceedings to challenge their detention and transfer,\(^{192}\) and denied the possibility of applying for a protection visa\(^ {193}\) in Australia unless the Minister for Immigration\(^ {194}\) personally granted permission, but would be taken to a 'declared country'\(^ {195}\) for processing. The two declared countries being Nauru and Papua New Guinea (PNG).\(^ {196}\)

The asylum seekers interdicted under the Pacific solution in the months following the legislative changes, had made 'secondary movements', meaning that they had proceeded to Australia from Indonesia, but originated from another State. The Australian government was eager to create the impression that the Pacific solution was necessary\(^ {197}\) on the basis that it would stem the 'mass influx' of refugees. However statistical evidence did not support this assertion.\(^ {198}\) The Australian government characterised the arrival of the asylum seekers that were rescued by the Tampa as being part of a large scale influx, because they included the asylum seekers along with other boat arrivals. This view is strongly contested by Human Rights Watch who at the time claimed that Australia took a tiny proportion of the world's refugees.\(^ {199}\) In addition it has been argued that the Australian government sought to create the misconception that Australia was facing a 'mass influx' so as to invoke the exception to the principle of non-refoulement under customary international refugee law.\(^ {200}\)

\(^{192}\)Migration Act, 1958, s. 494AA.
\(^{193}\)Migration Act, 1958, s. 36.
\(^{194}\)Migration Act, 1958, s. 46A.
\(^{195}\)Migration Act, 1958 s 198A.
\(^{196}\)Prior to Australia reaching agreements to transfer asylum seekers, that were intercepted on excised territory, to Nauru and PNG, Australia had attempted to reach agreements with East Timor, Kiribati, Fiji and Palau, Tuvalu, Tonga and France (in relation to French Polynesia). Fiji's Labor party leader Mr Mahendra Chaudry, was quoted as describing the offer of receiving money from Australia in exchange for processing asylum seekers as a 'shameful display of chequebook diplomacy' and as 'tantamount to offering a bribe', Fry, 2002, p. 26.
\(^{197}\)Kneebone, 2006, p. 697.
\(^{198}\)Bostock, 2002, p. 293.
\(^{200}\)Bostock, 2002, p. 293.
Nevertheless as outlined above, the Australian government after initially being frustrated in its attempts to seek support for its Pacific solution from numerous States, eventually turned to two States they knew they could obtain their acquiescence. Both Nauru which was virtually bankrupt and desperate for aid and PNG, its former colony, which was still heavily reliant on Australian aid, were willing to adhere to Australia's request of processing asylum seekers on their territory in exchange for money.201

4.2 Agreement with Nauru

Nauru, the world's smallest island nation, was approached by Australia to host a facility to process claims of asylum seekers. On 10 September 2001 a 13 point Statement of Principles and First Administrative Arrangement (FAA) was signed by President Harris of Nauru and Mr Reith, Australia's former Minister for Defence.202 In this arrangement Australia committed, amongst other things, to meet outstanding Australian hospital accounts, double the number of educational scholarships offered to students from Nauru, provide new sporting facilities and equipment and review options to provide advice on matters concerning telecommunications and aviation infrastructure.203 Australia retained exclusive or principal control over refugee status determination and in accordance with its agreement, Australia undertook responsibility for processing asylum seekers.204

On 11 December 2001 the Statement of Principles and FAA was terminated by the signing of the Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australian (MOU).205 Under the MOU, Nauru agreed to accept

202Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.
203Ibidem.
204Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues, para. 3.
certain persons on behalf of Australia\textsuperscript{206} and provide accommodation at two sites, known as Topside and Statehouse, for a maximum of 1200 (this was later increased to 1500) asylum seekers.\textsuperscript{207} This agreement was made on the basis that each person would be processed within six months of their arrival to Nauru, or in the alternative as short a time as reasonably necessary.\textsuperscript{208} Under the MOU Australia committed to ensuring that all the asylum seekers to be processed on Nauru will leave within six months,\textsuperscript{209} or as short a time reasonably necessary; that no person will be left behind on Nauru; that Australia would fully finance all operations involved;\textsuperscript{210} compensate Nauru for any loss incurred\textsuperscript{211} and promised an additional AUD$10 million in aid measures.\textsuperscript{212} Nevertheless, there was concern within the Nauruan community that the establishment of a detention facility may impact on the scarce resources on the island and that Australia was benefitting from the desperate situation of Nauru. The former President Rene Harris would later refer in 2002 to the arrangement with Australia as his 'pacific nightmare'\textsuperscript{213} and Nauruan Member of Parliament, Mr Anthony Audoa stated;

\begin{quote}
I don't know what is behind the mentality of the Australian leaders but I don't think it is right. A country that is desperate with its economy, and you try to dangle a carrot in front of them, of course, just like a prostitute...if you dangle money in front of her, you think she will not accept it. Of course she will, because she's desperate.\textsuperscript{214}
\end{quote}

The International Organisation of Migration (IOM)\textsuperscript{215} was engaged by Australia to provide staff to manage the detention centres and they entered into sub-contracts with

\begin{flushleft}
\textsuperscript{206}Senate Select Committee on a certain Maritime Incident, 2002, at 10.33  
\textsuperscript{207}Senate Select Committee on a certain Maritime Incident, 2002, at 10.35  
\textsuperscript{208}Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia cited in Senate Select Committee on a certain Maritime Incident, 2002, at 10.33.  
\textsuperscript{209}Senate Select Committee on a certain Maritime Incident, 2002, at 10.34  
\textsuperscript{210}Senate Select Committee on a certain Maritime Incident, 2002, at 10.36  
\textsuperscript{211}Ibidem.  
\textsuperscript{212}Senate Select Committee on a certain Maritime Incident, 2002, at 10.37.  
\textsuperscript{213}Taylor, 2005, p. 22.  
\textsuperscript{214}Oxfam, 'Adrift in the Pacific', 2002, p. 23.  
\textsuperscript{215}The IOM was formerly known as the Intergovernmental Committee for European Migration (ICEM), it was founded in 1951. It serves its member states and is not accountable to the U.N. General Assembly or bound by any international human rights treaties.
\end{flushleft}
caterers and security officers\textsuperscript{216}. Major sub-contractors included Eurest Support Services and Chubb Security Pty Ltd.\textsuperscript{217} The government of Nauru sought the assistance of UNHCR, from the outset, with the processing of the asylum seekers. UNHCR agreed to process only asylum seekers from the \textit{Tampa}, and the \textit{Aceng}.\textsuperscript{218} UNHCR did not wish to encourage the Australian policy and therefore refused to process any further asylum seekers on Nauru in a principled stance.\textsuperscript{219}

Nonetheless despite the concerns raised within Nauru to the detention of asylum seekers, the country's reliance on aid from Australia ensured that the initial MOU was renewed in 2002 with effect until 30 June 2003. A further extension was made in March 2004, when the governments of Australian and Nauru signed a third MOU which expired on 30 June 2005. A fourth MOU was signed along with development assistance in September 2005 which was scheduled to last until June 2007 but was prolonged until the end of 2007.\textsuperscript{220} Finally Australia ceased its arrangement with Nauru to detain asylum seekers in detention centres on the island in 2008, which coincided with the entry into power of the ALP government.\textsuperscript{221} Nauru acceded to the \textit{Refugee Convention} on 28 June 2011. Therefore for the duration of the arrangement to process asylum seekers on behalf of Australia, Nauru was not a signatory to the \textit{Refugee Convention}.

4.3 \textit{Agreement with PNG}

On 11 October 2001, Australian signed a MOU with PNG, with the objective stated as;

\begin{quote}
The parties agree that combating people smuggling and illegal migration in the Asia-Pacific region is a shared objective. The establishment of an immigration processing centre as a visible deterrent to people smugglers will enable joint cooperation, including the development of
\end{quote}

\begin{flushleft}
\textsuperscript{216}Chubb security were responsible for security inside the detention centre, while Australian Protective Services (APS) were responsible for security at the entrance checkpoints along with the local Nauruan Police.  \\
\textsuperscript{217}Senate Select Committee on a certain Maritime Incident, 2002, at 10.82.  \\
\textsuperscript{218}On 8 September 2001, 228 asylum seekers were intercepted by the HMAS Warramunga from a vessel named \textit{Aceng} and transported by the HMAS Manoora to Nauru.  \\
\textsuperscript{219}Human Rights Watch, 'By Invitation Only', 2002, p. 65.  \\
\textsuperscript{220}Oxfam, 'A Price too High: Australia's approach to asylum seekers', 2007, p. 56.  \\
\textsuperscript{221}Francis, 2008, p. 273.
\end{flushleft}
enhanced capacity in Papua New Guinea, to address these issues.\textsuperscript{222}

The MOU stipulated that a detention facility was to be built at the Lombrum, a former second World War air and naval base on Manus Island, which was 350 kilometres from the PNG mainland.\textsuperscript{223} Australia bore all the costs of establishing and operating the detention facility\textsuperscript{224} and the centre became operational on 21 October 2001.\textsuperscript{225} Under the MOU, 223 people that had been intercepted by the HMAS Adelaide on 8 October 2001 and 2 people intercepted by the HMAS Bendigo on 10 October 2001, were transferred to the detention facility.\textsuperscript{226} It was initially agreed that the detainees would stay for up to six months from their arrival date. Nevertheless with the Australian government finding it difficult to relocate the refugees, on 18 January 2002 an announcement was made expanding the processing facility's capacity up to 1000 people and to allow the detainees to stay for a period of up to 12 months.\textsuperscript{227}

In 2003 a further MOU was signed by the respective governments, which stipulated that the detention facility would continue to be operational until 21 October 2004.

Nevertheless the last refugee, Aladdin Sisalem\textsuperscript{228}, left the detention centre in May 2004.\textsuperscript{229} Whilst he was in detention by himself, Australian taxpayers continued to fund his detention, including the employment of guards and cleaners and the provision of housing, which according to the Department of Immigration, between July 2003 and


\textsuperscript{223}Kneebone, 2006, p. 709.

\textsuperscript{224}Senate Select Committee on a certain Maritime Incident, 2002, at 10.52.

\textsuperscript{225}Senate Select Committee on a certain Maritime Incident, 2002, at 10.53.

\textsuperscript{226}Senate Select Committee on a certain Maritime Incident, 2002, at 10.57.

\textsuperscript{227}Senate Select Committee on a certain Maritime Incident, 2002, at 10.59.

\textsuperscript{228}In 2003 Aladdin Sisalem remained at the Manus Island detention centre by himself (and a cat named honey) for 10 months, after the rest of the Asylum seekers from Iraq and Afghanistan were transferred to Nauru. His case was exceptional because he was the only person since the Australian government excised territory from the migration zone to reach Australian territory that had not been excised and seek asylum. He was a stateless Palestinian who had been unsuccessfully attempting to seek asylum for the previous 10 years in various states. His matter became publicised when the \textit{Sunday Telegraph} in Sydney on 15 February 2004, printed a front page article about how his detention was costing tax payers $AUD 23,000. He was eventually granted a humanitarian visa from the Australian government and enrolled in an engineering degree at RMIT University Melbourne.

\textsuperscript{229}Burnside, 2006, pp 15-16.
February 2004, cost $1.3 million.²³⁰

4.4  *Outsourcing the Processing of Asylum Seekers - Agreement with the International Organisation for Migration (IOM)*

The IOM is considered to be an International Organisation by definition in accordance with the draft Articles on the Responsibilities of International Organisations for Internationally Wrongful Acts. This is an important point which is addressed in Part B, when State responsibility is addressed. The IOM was contracted by the Australian government to provide reception and processing services on both Nauru and Manus Island, PNG, under a service agreement with the Department of Immigration and Multicultural and Indigenous Affairs.²³¹ Australia accordingly covered the costs of IOM's management and administration of the detention centres. It must be noted that at the time of IOM entering into an agreement with Australia to manage the detention centres, neither PNG nor Nauru were members of the IOM.

As previously mentioned the IOM is not a humanitarian or refugee protection agency, which detainees on Manus Island appeared to have been aware of and as a consequence pleaded for the involvement of UNHCR by placing signs on the fence of the detention centre making this request visible to outsiders.²³² In a letter addressed to Human Rights Watch, a detainee stated:

> Many thought IOM cared first for its own lucrative business and at second of asylum seekers, perhaps because of a good name. Some who had experienced it in Indonesia told us [that] as we would go under IOM management we would be forgotten by others.²³³

²³⁰Oxfam, 2007, p. 27.
4.5 *Creation of a Dual System*

The offshore processing of asylum claims implemented by Australia created a discriminatory system. Asylum seekers that made claims that were processed in Australia had access to independent merits review and legal advice and those processed offshore were not afforded these mechanisms.\(^{234}\) In addition during the years that offshore processing policies were supported by the Australian government, detention centres in Nauru and PNG were not subject to independent scrutiny from an Australian body, in contrast to those detention facilities in Australia which were. Accordingly a 'dual' system materialised, which penalised those asylum seekers processed offshore.\(^{235}\) Extraterritorial processing allowed for asylum claims to be effectively tested outside the legal system of Australia.\(^{236}\)

The offshore determination process was considerably different for people in Australia and those in offshore facilities. Asylum seekers in the the offshore refugee status assessment process were prevented from an independent merits decision by the Refugee Review Tribunal after receiving an initial administrative decision which was negative. In place of this review process, which is available for people seeking asylum within Australia, 'offshore entry persons' are able to request an internal review of the decision by a department officer who is more senior than the officer who made the initial finding.\(^{237}\)

Nevertheless, from the outset it is important to understand that Australia is responsible for any foreseeable breach of human rights of people that it forcibly compels to move to a third state.\(^{238}\) This means that Australia is responsible for human rights violations that

\(^{234}\) Von Doussa, 2007, p. 41.


\(^{237}\) Von Doussa, 2007, p. 41.

\(^{238}\) See the decision of the Human Rights Committee (HRC) in *GT v Australia*, Communication No. 706/1996, UN Doc CCPR.
are suffered by asylum seekers transferred to offshore destinations. According to the former Human Rights and Equal Opportunity Commission (HREOC), the offshoring arrangements under the pacific solution did not provide adequate safeguards to protect asylum seekers and refugees under the Convention of the Rights of the Child, the International Covenant of Civil and Political Rights (ICCPR) and the Refugee Convention. Therefore it is necessary important to establish the relevant human rights standards that are applicable in these circumstances.

5 Australia maintaining effective control

The following outlines effectively how Australian controlled the extraterritorial processing scheme and failed to protect asylum seekers rights;

1. Australia established its juridical link with the asylum seeker once it took custody and control of the asylum seeker.

2. Australia did not provide for any individualised assessment as to whether PNG and Nauru were in fact 'safe' States. Australia failed to implement a case by case system where determinations could be made as to whether the PNG or Nauru were indeed safe places for the individual asylum seeker.

3. There was no independent review of the arbitrariness of the detention before asylum seekers that were intercepted, were transferred to offshore detention.

4. Once the asylum seekers were in PNG and Nauru, Australia controlled various aspects by ensuring that PNG and Nauru did not;
   1. grant visas to foreign lawyers to access asylum seekers;
   2. grant visas to foreign journalists;
   3. grant access to the Australian Human Rights Commission.

5. Australia in accordance with its MOU with PNG and Nauru was responsible for;
   1. The day to day management of IDCs, through its agent, the IOM;

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239The Human Rights and Equal Opportunity Commission changed its name in 2008 to the Australian Human Rights Commission and is the Australian national human rights institution.

240HREOC, 2006, submission to the Senate Legal and Constitutional Committee Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.
2. Removal of the asylum seekers after processing;
3. Finding durable solutions, as the IOM was engaged to manage resettlement transfers to Australia and other State;
4. Handling transitory persons, who were transported to Australia due to health concerns and then returned to Nauru and PNG.241

6 Summary

Australia was responsible for the processing of asylum claims extraterritorially on PNG and Nauru. Australia effectively controlled the IDCs via the local authorities. This section demonstrates that the extraterritorial processing scheme created a 'dual system'. Australia entered into an outsourcing arrangement with the IOM to administer the processing of asylum claims. Part B refers in more detail to the legal implications of the relationships outlined in Part A.

PART B

Extraterritorial Jurisdiction

7 Outline

Part B undertakes a legal analysis of extraterritorial processing and outsourcing arrangements. It begins by discussing the issues surrounding 'jurisdiction' and its application in an extraterritorial sense. Jurisdiction is viewed from both a public International Law and Human Rights perspective.

In section 4, analysis is made of State obligations that arise under Refugee law and International Human Rights law. In relation to Article 31 close attention is given to the aspect of non-penalisation and the meaning of coming directly. In regards to Article 33, the principle of non-refoulement is examined in detail.

Section 5 discusses the position human rights law within the confines of the ICCPR. Primary focus is given to Article 9. Therefore attention is paid to the travaux préparatoires relating to the word 'arbitrary' and its meaning. Subsequent analysis of Articles 7 and 10 is then undertaken. The section then examines the issue of extraterritorial applicability in general with respect to the ICCPR.

Section 6 then dissects the ILC Articles on State Responsibility in relation to Australia's agreements with both PNG and Nauru. Section 7 briefly addresses the draft articles of responsibility for International Organisations and seeks to establish whether Australia can be held accountable for the actions of the IOM regarding offshore processing.

8 Public International Law
Prior to attempting to ascertain state responsibilities for human rights violations that have taken place offshore, it is essential to determine which jurisdiction is applicable in an extraterritorial context. International law is a set of norms that are not exclusively framed in horizontal relationships between States, but can be vertical obligations between each State and its subjects. Jurisdiction pursuant to Public International Law is conceptually understood as a State's claim to exercise power with and against other States within territorial boundaries.

A doctrinal analysis of extraterritorial jurisdiction is generally categorised as being either prescriptive jurisdiction or enforcement jurisdiction. It is sometimes noted that 'judicial jurisdiction' comprises a third category of jurisdiction. Prescriptive jurisdiction is considered in the *Lotus* case, where it was held that International Law contains a wide measure of discretion which is only limited in certain circumstances where States are able to extend the application of their laws and jurisdiction to persons outside their territory. On the other hand enforcement jurisdiction, the presumption is prohibitive rather than permissive, meaning that the jurisdiction of a State is limited to the territory of the State with some exceptions, an example being *res communis* and its application in International waters. However, according to Milanovic, the entire law of jurisdiction is primarily based on exceptions to the principle of territoriality.

## 9 Human Rights perspective

Extraterritorial jurisdiction within a human rights context is understood differently as to the conception in public international law. Human rights legal practitioners determine as

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244Higgins, 1984.
245Gammeltoft-Hansen, 2009, p. 138. For the purposes of this thesis 'judicial jurisdiction' will not be considered as a separate category.
246*Case of the S.S. Lotus*. Permanent Court of International Justice. PCIJ Series A – No. 10. 7 September 1927, p. 19.
to whether a State is bound to respect relevant human rights obligations, whereas in public international law, extraterritorial jurisdiction is understood as to whether a State's claim to extend its jurisdiction is lawful or illegal.\textsuperscript{249} In addition International Human Rights law understands jurisdiction in terms of drawing a connection between the State and the individual, rather than whether the State has control over a region.\textsuperscript{250}

Extraterritorial jurisdiction in a broader notion of territory, not just a State's own territory, has been accepted by International case law whenever the authorities of a State party exercise 'effective control' over territory or over persons outside the territory of a State.\textsuperscript{251} Wilde stipulates that when analysing jurisdiction in an extraterritorial context, jurisdiction is conceived in terms of the existence of a connection between the State on one hand and either a 'spatial connection', in relation to the territory where the act took place, or a 'personal connection', which relates to the individual that is affected the action of the State.\textsuperscript{252}

In spite of the above conceptions that seek to determine what extraterritorial jurisdiction means, Gammeltoft-Hansen calls for a new way of conceptualising the notion of jurisdiction within human rights and claims that in a globalised world, it is necessary to make a 'quantum leap' from the traditional notions of jurisdiction which suffer from the Westphalian notion of sovereignty and its predominance.\textsuperscript{253}

\section*{10 Refugee Law}

The fundamental principles stipulated within the Refugee Convention define a refugee as someone who has a well founded fear of persecution in their country of origin and it outlines the tenet of \textit{non-refoulement}, being that no refugee should be returned to the territory of a state where his or her freedom is in danger. A person is considered to be a

\begin{itemize}
\item \textsuperscript{249}Roxtrom, 2005, p. 112.
\item \textsuperscript{250}Wilde, 2005, p. 802.
\item \textsuperscript{251}Novak, 2010, p. 14.
\item \textsuperscript{252}Wilde, 2005, p. 798.
\item \textsuperscript{253}Gammeltoft-Hansen, 2010, pp. 80 – 81.
\end{itemize}
refugee within the meaning of the *Refugee Convention* as soon as he or she fulfils the criteria set out in the refugee definition. Accordingly refugee status is declaratory in nature. Therefore a person does not become a refugee because they are recognised, but because he or she simply is a refugee.\(^{254}\)

Nevertheless the *Refugee Convention* fails to outline and regulate the responsibilities of States between themselves or indicate which State should consider an asylum claim for protection.\(^{255}\) It outlines rules and standards of how States can treat refugees, which are in essence, although not exclusively, territorial in nature.

**Note on Methodology**

In accordance with Article 31 (1) of the *Vienna Convention on the Law of Treaties*, the ordinary meaning of the treaty can be interpreted from the terms of the treaty and in light of its object and purpose. Therefore it is useful to refer to the preamble of the *Refugee Convention* for guidance. It has been noted before that the preamble stipulates that 'the widest possible exercise' of the fundamental rights and freedoms should be assured to refugees. The preamble also affirms the principles of the *UN Charter* and the *Universal Declaration of Human Rights*, making it evidently clear that the preamble refers to International legal instruments that have as their object and purpose the protection of the equal enjoyment by every person of fundamental rights and freedoms.\(^ {256}\)

Furthermore when determining the meaning of a treaty, it is essential that a treaty is interpreted and applied so as to ensure its effectiveness.\(^ {257}\) Accordingly it can be articulated that the duty to ensure effectiveness of a treaty is simply the application of the rule of *pacta sunt servanda*.

The *travaux préparatoires* is to be considered a supplementary means of interpretation,

\(^{255}\)Goodwin-Gill, 2007, p. 27.
when there is ambiguity or obscurity in relation to the meaning of the treaty. Due to the
continued debate and disjuncture surrounding the interpretation of the meaning of
various aspects of the *Refugee Convention*, it is useful to use the *travaux préparatoires*
for guidance. Another form of interpretative guidance is State practice. Accordingly,
UNHCR Executive Committee Conclusions are also used to assist interpreting the
meaning of the *Refugee Convention*.

10.1 *Article 31*

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on
refugees who, coming directly from a territory where their life or freedom was threatened in the sense
of Article 1, enter or are present in their territory without authorization, provided they present
themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than
those which are necessary and such restrictions shall only be applied until their status in the country is
regularized or they obtain admission into another country. The Contracting States shall allow such
refugees a reasonable period and all the necessary facilities to obtain admission into another country.

10.1.1 *Analysis of Article 31 - Travaux Préparatoires*

The *Ad Hoc Committee on Statelessness and Related Problems*

At the *Ad Hoc Committee* it was proposed that refugees illegally entering a State should
be exempted from penalties, which was then draft Article 24.\(^{258}\) It was noted that
refugees who are fleeing their country or origin, are rarely in a position to legally
comply with the requirements for entry, by having proper documentation.\(^{259}\)

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\(^{258}\) Draft Article 24: 1 – The High Contracting Parties undertake not to impose penalties, on account on
their illegal entry or residence, on refugees who enter or are present in their territory without prior or
legal authorization, and who present themselves without delay to the authorities and show good cause
for their illegal entry. UN Doc, E/AC.32.L.26, 3 February 1950.

\(^{259}\) UN Doc. E/AC.32.L.38, 15 February 1950.
There was much discussion relating to the final draft of Article 31. The French delegate sought to restrict the scope of who should be granted asylum and advocated that asylum should not be granted to those who had already 'found asylum', and argued that the refugee should show more than 'good cause' for entering a State illegally. The British delegate stated that fleeing persecution was itself a good cause for illegal entry but that there were other good causes. Furthermore the United Nations High Commissioner for Refugees stated his concern for 'necessary transit' and the difficult plight of refugees arriving in an inhospitable country. Therefore it was eventually agreed that Article 31 should include in the wording threats to 'life or freedom' as possible reasons for illegal entry; refrain from linking such a threat to the refugee's country of origin and establish that a refugee may have a 'good cause' for illegal entry other than persecution in their country of origin.

Moreover it was not the intention of the drafters of the Refugee Convention that the term 'coming directly' was not to be construed literally, as expressed by Mr. Larsen of Denmark, the President of the Conference of Plenipotentiaries in 1951 and by Mr Herment of Belgium.

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262 Dr. Van Heuven Goedhart, the UNHCR High Commissioner, at the 1951 Conference, recalled how he escaped persecution from his county, the Netherlands in 1944, had hidden for five days in Belgium before fleeing further prosecution to France where he was helped by the French Resistance and then on to Spain and finally reaching safety in Gibraltar. He advised that it would be unfortunate that refugees would be penalised for attempting a similar journey, having not proceeded directly to the final country of asylum. UN Doc. A/CONF.2/SR.14, p.4.
263 ‘A refugee in a particular country of asylum, for example, a Hungarian refugee living in Germany, might, without actually being persecuted, feel obliged to seek refuge in another country; if he then entered Denmark illegally, it was reasonable to expect that the Danish authorities would not inflict penalties on him for such illegal entry, provided he could show good cause for it’: UN Doc. A/CONF.2/SR.13, 10 July, 1951, at 15.
264 ‘The purpose...was to exempt refugees from the application of the penalties imposable for the unlawful crossing of a frontier, provided they presented themselves of their own free will to the authorities and explained their case to them’: UN Doc. A/CONF.2/SR.13, 10 July, 1951, at 14.
**Restriction on freedom of movement under Article 31(2) – Detention**

Detention of asylum seekers was considered only necessary for a few days so as to investigate the identity of the asylum seeker and apart from that, further detention would only be necessary in cases of a threat to security or of a great and sudden influx.265 Therefore the State is required to justify as necessary when the detention of a refugee or asylum seeker has been prolonged, under Article 31 (2).

### 10.1.2 International Standards – Demonstrating State Practice

**Decisions of UNHCR Executive Committee**

Due to the wide involvement of States during the Executive Committee meetings, it can be inferred that decisions of UNHCR Executive Committee meetings form state practice. The Executive Committee in 1979266 concluded that in the situation where a refugee has already been granted asylum in one country but subsequently sought asylum in another country due to fear of persecution or because of a fear of physical safety or his or her freedom is threatened, the authorities of the second country of asylum should give favourable consideration to the asylum request.267 In 1989 the Executive Committee268 concluded that where a refugee or an asylum seeker has moved irregularly from one state where they have already found protection to another state, they may be returned on the premise that they are protected against *refoulement* and permitted to remain in the state and be treated in accordance with basic human standards until a durable solution is found.269 Nevertheless it was also concluded that;

(g) It is recognised that there may be exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection.270

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266 Executive Committee Conclusion No. 15 (XXX) – 1979 Refugees without an Asylum Country.
267 UNHCR, UN Doc. A/AC.96/572, para. 72(2).
268 Executive Committee Conclusion No. 58 (XL) – 1989.
269 UNHCR, UN Doc. A/AC. 96/737, p. 23.
270 Executive Committee Conclusion No. 58 (XL) – 1989, UNHCR, UN Doc. A/AC. 96/737, p. 23.
Therefore it can be concluded that refugees are not required to have *come directly* from their country of origin, as it has been evidenced from the *travaux préparatoires* that Article 31 was intended to apply to persons transiting other states, who have been unable to find protection from further persecution and have a 'good cause' for illegal entry.

In 1986\(^{271}\) the UNHCR Executive Committee concluded that;

- if necessary, detention may be resorted to only on grounds prescribed by law to verify identity;
- to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.\(^{272}\)

In 1998 the UNHCR Executive Committee\(^{273}\) deplored the State practice of routinely detaining asylum seekers, including children, on:

1. An arbitrary basis,
2. For unduly prolonged periods,
3. Without providing access to UNHCR and fair procedures for status review.\(^{274}\)

UNHCR has reaffirmed in its 'Guidelines on the Detention of Asylum Seekers' that 'as a general principle, asylum seekers should not be detained'.\(^{275}\)

In addition the United Nations High Commissioner for Refugees in 2006 stated that if the offshore processing procedures proposed by the Australian government\(^{276}\) was 'not one that meets the same high standards Australia sets for its own processes, this could be tantamount to penalising for illegal entry'.\(^{277}\)

\(271\) The Executive Committee Conclusion No. 44 - 1986.
\(272\) UN Doc. A/AC.96/601, para. 57.
\(273\) Executive Committee Conclusion No. 85 on International Protection – 1988.
\(274\) Executive Committee Conclusion No. 85 on International Protection – 1988, para. dd.
\(276\) In the Migration Amendment (Designated Unauthorised Arrivals) Bill 2004.
\(277\) UNHCR submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the
10.1.3 Authors opinions

Article 31 prohibits the penalisation\textsuperscript{278} of asylum seekers on the basis that they have entered into the territory of a State illegally, where they are 'coming directly' from a territory where their life or freedom was threatened,\textsuperscript{279} provided they have presented themselves 'without delay to the authorities and show good cause for their illegal entry or presence'. This provision has been utilised by States to justify the detention of people before transferring them to 'third countries',\textsuperscript{280} on the basis that they have not come directly from their state of origin and arrived in the state of refuge via secondary states. This restrictive interpretation has been strongly refuted by Goodwin-Gill and Hathaway who both argue that refugees are not required to come directly from their country of origin to claim asylum.\textsuperscript{281}

Article 31 was intended to apply as well to persons who had transited other states, but were unable to ascertain protection from persecution in the first country or countries to which they had fled, or have good cause for not applying in such a country or countries for asylum.\textsuperscript{282} The state must first assess the claim for asylum to ensure that it discharges its international obligations. Otherwise the detention and interdiction of a person as a preliminary step in the process of transferring the asylum seeker to a 'safe third country' will be tantamount to a penalty and accordingly will be in contravention to Article 31.\textsuperscript{283} Moreover Goodwin-Gill has observed that it has been found that 'any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on

\begin{itemize}
\item \textsuperscript{278}Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2004 [25]
\item \textsuperscript{279}The term ‘penalties’ as referred to in Article 31(1) is not defined, but includes prosecution, fine, imprisonment, and other restrictions on freedom of movement. Refer to Goodwin-Gill, 2001, p. 34.
\item \textsuperscript{279}UNHCR have asserted that ‘coming directly’ in Article 31 (1) encompasses the situation of a person who enters a state where asylum is sought directly from origin to include ‘or from another country where his protection, safety and security could not be assured’. See UNHCR Guidelines and Applicable Criteria and Standards Relating to the Detention of Asylum Seekers [4].
\item \textsuperscript{280}Kneebone, 2006, p. 710.
\item \textsuperscript{281}Goodwin-Gill, 2001, p. 9 and Hathaway, 2005, pp. 394 – 395.
\item \textsuperscript{282}Goodwin-Gill, 2001, p. 33.
\item \textsuperscript{283}Kneebone, 2006, p. 712.
\end{itemize}
10.2 **Article 33**

Article 33 Prohibition or expulsion or return ('refoulement')

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

10.2.1 *Travaux Préparatoires*

*The Ad Hoc Committee on Statelessness and Related Problems*  

The discussions relating to the drafting of the Refugee Convention commenced in 1950 when thirteen States convened in two sessions in January and August 1950 with the purpose of preparing a draft text. It was clear from the commencement of the discussions that the *non-refoulement* principle was crucial in ensuring the functionality of the Convention as it might significantly curtail the sovereignty of the State. The duty of *non-refoulement* is not the same as the right to seek asylum from persecution in two aspects. Firstly, the duty of *non-refoulement* only prevents actions that effectively lead to refugees to 'be pushed back into the arms of their persecutors.' Consequently there is no obligation for States to receive refugees under Article 33 of the Refugee

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285 The meeting was initially referred to as the *Ad Hoc* Committee when it met in February 1950. When it reconvened in August 1950 it was renamed the *Ad Hoc* Committee on Refugees and Stateless Persons.

Convention and this point was conveyed as 'a negative duty forbidding the expulsion of any refugee to certain territories but did not impose the obligation to allow a refugee to take up residence'.\textsuperscript{287} Secondly, due to the consequential nature of the implied duty to admit refugees under Article 33, the right to seek asylum is only valid for the period of time that the risk of persecution exists.

The \textit{Ad Hoc} Committee adopted a broad approach when considering as to whether Article 33 should encompass a wide geographical scope. The French representative emphasised the absolute nature of the \textit{refoulement} prohibition, arguing that 'any possibility, even in exceptional circumstances, of a genuine refugee being returned to this country of origin would not only be inhuman, but was contrary to the very purpose of the Convention'.\textsuperscript{288}

It is important to understand the absence of a requirement of authorisation of entry in Article 33. The original prohibition on \textit{refoulement}, was included in the 1933 Convention, which stated that asylum could only be claimed by 'refugees who have been authorized to reside [in the state party] regularly'.\textsuperscript{289} Nevertheless this approach was not adopted by drafters at the \textit{Ad Hoc} Committee, and the text submitted by the non-governmental organisation, Aguda Israeli World Organisation, was used to draft Article 33 with no reference of the requirement of refugees to have authorised arrival.\textsuperscript{290}

\textit{Expulsion and non-admittance}

The debates of the \textit{Ad Hoc} Committee demonstrate a strong desire to ensure that peremptory non-admittance and expulsion is normally not permissible. It was argued that;

\begin{quote}
whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to
\end{quote}

\textsuperscript{287}Ad Hoc Committee on Statelessness and Related Problems, Statement of Mr. Weis of the International Refugee Organisation, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 33.
\textsuperscript{288}UN Doc. E/AC.32/SR.40, para. 33.
\textsuperscript{289}Cf. Hathaway, 2005, p. 302.
\textsuperscript{290}Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/L.22, Feb.1, 1950.
residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom be threatened.291

The Israeli delegate, Mr. Robinson supported this view, by stating 'The article must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance'.292 The comprehensive nature of the duty of non-refoulement was further expressed by Mr. Cuvelier of Belgium, who stated that it was expanded to ensure 'not to expel or in any way return refugees'.293

**The Conference of Plenipotentiaries**

The wide approach that was preferred by the Ad Hoc Committee, in relation to geographical scope of Article 33, was somewhat narrowed by the Conference. The Swiss representative stated that;

> In the Swiss Government's view, the term 'expulsion' applied to a refugee who had already been admitted to a territory of a country. The term 'refoulement', on the other hand, had a vaguer meaning, it could not, however, be applied to a refugee who had not yet entered the territory of a country. The word 'return' used in the English text, gave that idea exactly.294

Furthermore the Swiss representative insisted that States could not be forced to accept large groups of people crossing its frontiers.295 Therefore two conflicting interpretations emerge; the broad approach by those advocating in line with the reasoning of the Ad Hoc Committee who argue that non-refoulement should apply widely. On the other hand, the Conference favoured the stricter meaning, limiting the scope of who should be protected from non-refoulement.

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295Ibidem. The Swiss interpretation of the text was supported by France, Italy, Sweden, Netherlands and the Federal Republic of Germany. Refer to UN Doc. A/CONF/2/SR.16, p. 6ff.
Despite the view advocated by some academics that the Refugee Convention bestows upon asylum seekers broad rights and positively applies extraterritorially, this interpretation fails to acknowledge the intention of the drafters at the Conference to restrict the territorial application. From the outset it is somewhat complex and certainly not clear as to what extent non-refoulement applies extraterritorially, in light of the Refugee Convention. Accordingly it is useful to refer to State practice on this issue, as the travaux préparatoires highlights tensions that exist with respect to the interpretation of non-refoulement under Article 33.

10.2.2 International Standards – Demonstrating State Practice – Decisions of UNHCR Executive Committee

As stipulated earlier in relation to the analysis of the State practice relating to Article 31, in accordance with the Vienna Convention reference can be made to State practice to determine the meaning of a treaty. Numerous Executive Committee Conclusions attest to the overriding importance of the principle of non-refoulement. Executive Conclusion No. 6 (XXVIII) concluded that the 'fundamental importance of the observance of the principle of non-refoulement - both at the border and within the territory of the State'. 296 In addition Executive Conclusion No. 15 (XXX) stated it ‘is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum’. 297

10.2.3 Non-refoulement and the Pacific solution

Offshore processing arrangements do not in themselves breach the right to non-

296 Executive Conclusion No. 6 (XXVIII), para. c.
refoulement. A state will not contravene article 33(1) of the Refugee Convention if it sends an asylum seeker to a 'third country' which is considered to be safe and the refugee will receive effective protection. If a State proposes to remove a refugee from its territory to a 'safe third State', it is required to undertake a proper assessment as to whether the third country is actually safe. On this basis it is particularly dubious if Australia correctly discharged its obligations pursuant to the Refugee Convention during the implementation of the pacific solution, as it relied on PNG and Nauru to comply with non-refoulement obligations on its behalf. Taking into account that Nauru had not ratified the Refugee Convention at the time of the 'pacific solution' and that PNG has done so but conditionally, by placing many reservations, the pacific solution not only created a problematic situation, but an environment where the rights of asylum seekers were not sufficiently protected.

The problem of having to rely on a 'third state' to discharge their duties not to return an asylum seeker to a state that is not safe, was acknowledged by the former Prime Minister Howard, when he noted that offshore processing lacks basic safeguards that are available to asylum seekers processed within Australia. Consequently this leads to the possibility that offshore processing increases the incidents of refoulement, as errors might be made in the decision making process.

299PNG acceded to the 1951 Convention and the 1967 Protocol in 1986, with reservations made to articles 17(1) relating to wage earning employment, article 21 relating to housing, article 22(1) relating to public eduction, article 31 relating to refugees unlawfully in the country of refuge and article 32 relating to expulsion of refugees. Refer to Tsamenyi, Papua New Guinea's Accession to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 1989, pp 180-198.
300Despite the fact that Nauru has not ratified the Refugee Convention and relating Protocol, non-refoulement of refugees is prohibited by customary international law. Article 38(1)(b) of the Statute of the International Court of Justice states that 'international custom, as evidence of a general practice accepted as law' as one of the sources of law which it applies when resolving disputes pursuant to International law. Further for a rule to form part of the body of customary international law, it has to be consistent with State practice and opinio juris. See International Court of Justice, North Sea Continental Shelf, Judgment, 1969, ICJ Reports, para 74.
301Cf. Von Doussa, p. 48.
10.2.4 Extraterritorial application

Refugee Convention

According to an advisory opinion by the UNHCR;

Any interpretation which construes the scope of Article 33(1) of the 1951 Convention as not extending to measures whereby a State, acting outside its territory, returns or otherwise transfers refugees to a country where they are at risk of persecution would be fundamentally inconsistent with the humanitarian object and purpose of the 1951 Convention and its 1967 Protocol.302

In relation to the travaux préparatoires this thesis outlines the tension that arises between the differing intentions of the drafter from the Ad Hoc Committee and the Conference of Plenipotentiaries. This tension has resulted in claims by mainly States that the application of extraterritorial application of the principle of non-refoulement is not established and at best unclear. Some States cite the decision in the Sale matter as representing the position of jurisprudence in relation to the rule on non-refoulement. Nevertheless such an interpretation is limited in scope. As this thesis demonstrates it is important to arrive at the ordinary meaning of the treaty and to also refer to the travaux préparatoires and State practice for further but subsidiary guidance. Therefore an extensive and thorough analysis of Refugee Law would conclude that there was tension at the travaux préparatoires as to the territorial application of the non-refoulement rule but that the overriding purpose which is evident in the preamble, upon interpreting the ordinary meaning of the treaty in conjunction with State practice as evidenced by numerous UNHCR Executive Committee decisions and conclusions, leads to the extraterritorial application of the non-refoulement principle regarding Article 33 of the Refugee Convention. Therefore, despite the decision in the US Supreme Court matter of Sale, the better view as expressed by the UNHCR's amicus brief303 and by leading commentators is that non-refoulement obligation applies wherever the State acts.

303 Ibidem.

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11 Human Rights Law

11.1 *International Covenant on Civil and Political Rights (1966)*

Article 9, paragraphs (1) and (4);

1 - Everyone has the right to liberty and security of his liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established in law.

4 - Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

11.1.1 Analysis of Article 9 - Travaux Préparatoires

The final text that was adopted was based on the British draft formulated by the Human Rights Committee in 1947.\(^{304}\) There was much discussion as to the significance of including arbitrary arrest in the Article. Considering the Australian practice of 'mandatory detention' it is interesting to note that in 1949 the Human Rights Committee unanimously adopted an Australian proposal which prohibited anyone from being arbitrarily arrested or detained.\(^{305}\) Nevertheless the meaning of the term 'arbitrary' was polemical. Discussions at the 3d Committee of the GA debated the British representative's concern that the term was unclear and consequently a British motion to remove the term 'arbitrary' was put forward. However the British motion was defeated with a large majority.\(^{306}\)

It is clear that the intention of the drafter was that, in accordance with the 'ordinary

\(^{305}\) UN Doc. E/CN.4/SR.95, 6.
\(^{306}\) UN Doc. A/C.3/L.686; A/C.3/SR.866, para. 38. There were seventy votes for and three abstentions, which included the UK, Israel and South Africa.
meaning to be given to the provisions in their context' as required by Article 31 (1) of the Vienna Convention of the Law of Treaties, Article 9 guarantees a broad right to the 'liberty of person', which can only be deprived in cases authorised by the law. The Human Rights Committee intended that the requirement of lawfulness extend to cover 'all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control'\(^{307}\)

Therefore there are two limiting requirements that must be satisfied by the State when depriving the liberty of a person;

1. the principle of legality,
2. the prohibition of arbitrariness.

**Principle of Legality**

In relation to the principle of legality, there can be no doubt that the drafters intended the word 'law' to refer primarily to domestic law.\(^{308}\) However there are circumstances where 'law' can have a wider meaning. Nevertheless as is discussed below, in cases relating to the Australian practice of mandatory detention of asylum seekers entering into Australia without a valid visa, the Committee has held that judicial review of the lawfulness of detention under Article 9 (4) must also include compatibility with international law.

**Prohibition of Arbitrariness**

The prohibition against arbitrariness establishes an additional limiting factor to the deprivation of liberty. There was some debate during the travaux préparatoires as to the meaning of 'arbitrary'. Some considered 'arbitrary' should be interpreted as meaning nothing more than 'unlawful' while the majority conceived the meaning in the line with

the Anglo-American principle of due process of law.\textsuperscript{309} Therefore a broad conception of the term was accepted.

There are circumstances that may initially fulfil both aspects, being that the detention was lawful and not arbitrary but may become arbitrary after the expiration of a certain amount of time. This situation emerged in relation to the cases against the Australian case involving asylum seekers who had been detained in accordance with Australian law. Despite the Human Rights Committee acknowledging that asylum seekers may be detained for a certain period of time with proper justification, the duration of detention must be proportional. In \textit{A v Australia}\textsuperscript{310} a period of four years was considered to be arbitrary, and in \textit{C v Australia} it was considered that 'immigration detention for over two years without individual justification and without any chance of substantive judicial review' as arbitrary and in violation of Article 9 (1).\textsuperscript{311}

\textbf{Right to Habeas Corpus}

Article 9 (4) stems from the Anglo-American principle of \textit{habeas corpus}. This right exists regardless of whether deprivation of liberty is unlawful, meaning that this right can be violated if detention has been made in accordance with law. The reference to the 'nature of habeas corpus' found in the original draft by the Human Rights Committee was omitted so as to allow this right to be structured according with the particular requirements of each legal system.\textsuperscript{312}

There was extensive discussion as to the meaning of the word 'court'. The French representative sought unsuccessfully to replace it with 'judicial or administrative

\textsuperscript{309} UN. Doc.A/C.3/SR.863, paras. 15, 17. Also refer to the views of the Committee in \textit{van Alphen v the Netherlands}, No. 305/1988, para. 5.8.

\textsuperscript{310} \textit{A v Australia} No. 560/1993, paras. 9.3, 9.4.

\textsuperscript{311} \textit{C v Australia} No. 900/1999, para. 8.2. Also refer to the cases \textit{Baban et al v Australia} No. 1014/2001, para. 7.2, where it was considered that immigration detention for almost two years was contrary to Article 9; \textit{Bakhtiyari et al v Australia} 1069/2002, para. 9.3, where it was considered that immigration detention for almost three years was contrary to Article 9.

\textsuperscript{312} Cf. Novak, 2005, p. 235.
court', before the Costa Rican proposal was accepted which meant 'court' should be considered to be a 'court of justice'.\textsuperscript{313} Therefore as confirmed in the decision of \textit{Vuolanne v Finland}, a military court is considered to be a 'court of justice' and accordingly satisfies Article 9 (4).

Interpreting the \textit{ordinary meaning} of Article 9 (4) would suggest that the Australian practice of mandatory detention would breach the right to \textit{habeas corpus}, as the possibility of judicial review of detention is limited to certain situations. In a number of decisions by the Human Rights Committee, violations of Article 9 (4) have been found:

Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of a detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.\textsuperscript{314}

\textbf{Article 7}

\textit{Prohibition of torture}

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

\textbf{Article 10}

\textit{Right of Detainees to be Treated with Humanity and Dignity}

10 (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 10 refers to all persons in detention, not just convicted persons and is therefore relevant to persons detained in IDCs.

The prohibition against torture is a non-derogable right enshrined in various human rights treaties.\textsuperscript{315} Torture is also prohibited by customary international law and is

\begin{itemize}
  \item \textsuperscript{313} Gen C 8/16, para. 14.
  \item \textsuperscript{314} Badan et al v Australia, No 1014/2001, para. 7.2; C v Australia, No 900/1999, para. 8.3; Bakhtiyari et al v Australia, No 1069/2002, paras. 9.4, 9.5.
  \item \textsuperscript{315} For example: Article 5, \textit{Universal Declaration of Human Rights 1948}, Article 7 in conjunction with Article 2, \textit{ICCPR}.
\end{itemize}

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considered as being *jus cogens* pursuant to Article 53 of the *Vienna Convention on the Law of Treaties*.\(^\text{316}\) ‘Torture’ refers to both physical and mental forms. Torture has a high threshold as in order to establish torture taking place, it must be evident that the action concerned was fulfilling a certain purpose, meaning that there has to be intent to cause severe pain. It is difficult to make the delineation between what is ‘torture’ and what is 'degrading and/or cruel treatment', but it appears that the latter occurs when there is a lack of a certain intensity that would qualify as ‘torture’.\(^\text{317}\)

**Condition of detention**

In relation to detainees, it is usual that if it is found that a violation of article 7 has taken place, a violation of article 10 has probably occurred as well.\(^\text{318}\) The Human Rights Committee commented that when considering matters of alleged torture in detention, recourse should be made to the UN Standard Minimum Rules for the Treatment of Prisoners 1955;

> As to the conditions of detention in general, the Committee observes that minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development.\(^\text{319}\)

**11.2 Extraterritorial Applicability**

**ICCPR**

The Human Rights Committee addressed the issue of extraterritorial applicability, when it stated that;

> States are required by Article 2(1) [of the ICCPR] to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This

\(^\text{317}\) Domukovsky et al v Georgia, Nos. 623, 624, 626, 627/1995, para. 18.6
\(^\text{318}\) For example Edwards v Jamaica, No 529/1993; Smith & Stewart v Jamaica, No 668/1995; Brown v Jamaica 775/1997.
means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.\textsuperscript{320}

General Comment No. 31 reaffirms prior decisions by the Human Rights Committee which have found that States can be held accountable for human rights violations under the ICCPR by actions committed by its agents on the territory of another State.\textsuperscript{321} In the same case, it was determined that

> It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetuate violations of the Covenant on the territory of another State, which violations it could not perpetuate on its own territory.\textsuperscript{322}

The Committee has unequivocally asserted that States cannot carry out actions in the territory of other States that would be repugnant to its own obligations had it carried out those actions within its own territory. Accordingly the Committee has established a principled basis for conceiving human rights obligations extraterritorially, in that States cannot pertain to have a 'double standard'.\textsuperscript{323} The Human Rights Committee also found that people may fall under the umbrella of a State's obligations pursuant to the ICCPR, even when they are outside the territory of that State.\textsuperscript{324} Wilde dispels the notion of a legal black hole that exists in relation to the activities of States that take place extraterritorially and asserts that it is not possible to avoid the norms established in the ICCPR.\textsuperscript{325}

The International Court of Justice (ICJ) has added further weight to support the case that the ICCPR is applicable to States in an extraterritorial nature. The Court found that

\begin{itemize}
\item 320 Human Rights Committee, General Comment No. 31, para. 10.
\item 322 \textit{Lopez v Uruguay}, 1981, at para. 12.3.
\item 323 Wilde, 2005, p. 792.
\item 324 Concluding Observations of the Human Rights Committee, United States of America, 3 October 1995, at para 284.
\item 325 Wilde, 2005, p. 805.
\end{itemize}
with respect to acts carried out by a State in the exercise of its jurisdiction outside its own territory that States are bound by its obligations established in the ICCPR.\textsuperscript{326} The ICJ has observed that;

\begin{quote}
While the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.\textsuperscript{327}
\end{quote}

12 ILCs Articles on State Responsibility for Internationally Wrongful Actions

12.1 Article 16

\textit{Aid or assistance in the commission of an internationally wrongful act}

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

\begin{enumerate}
  \item that State does so with knowledge of the circumstances of the internationally wrongful act; and
  \item the act would be internationally wrongful if committed by that State.
\end{enumerate}

12.2 \textit{Analysis of Article 16 and commentary}

Article 16 deals with situations where a State provides another with aid or assistance to facilitate the commission of a wrongful act, for example, by knowingly providing as


'essential facility' or 'financing the activity in question'.\textsuperscript{328} The State which is primarily responsible is the acting State, the assisting State is considered to play a supporting role only and to the extent that it has caused or contributed to the wrongful act.\textsuperscript{329} Although a State is not bound by the obligations of another State, in accordance with the \textit{Vienna Convention},\textsuperscript{330} a 'State cannot do by another what it cannot do by itself'.\textsuperscript{331}

There are three factors that limit the scope of responsibility, being:

1. The assisting State must be aware that the conduct is wrongful,
2. Aid and assistance given by must facilitate the wrongful act, and
3. The act must have been considered wrongful if it had been committed by the assisting State.\textsuperscript{332}

In the \textit{Bosnia Genocide} case the ICJ referred to Article 16 as 'reflecting a customary rule'.\textsuperscript{333} The ICJ found that the assisting State must be aware of the 'special intent' of the perpetrator State. The standard required by Article 16, by application of the ICJ, is the requirement of special knowledge of the alleged accomplice, with a high degree of particularity.\textsuperscript{334}

\textit{12.3 Article 17}

\textit{Direction and control exercised over the commission of an international wrongful activities}

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

\begin{itemize}
\item \textsuperscript{328} ILC Articles, Commentary to article 16, para. 1.
\item \textsuperscript{329} Ibidem.
\item \textsuperscript{330} Article 34, 35 of the Vienna Convention on the Law of Treaties.
\item \textsuperscript{331} ILC Articles, Commentary to article 16, para. 6.
\item \textsuperscript{332} ILC Articles, Commentary to article 16, para. 3.
\item \textsuperscript{333} Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, 26 February 2007, para. 422.
\end{itemize}
12.4 **Analysis of Article 17**

Article 17 is limited to cases where a dominant State actually directs and controls the conduct which is in breach of an international obligation of the dependent State. In contrast to Article 16, the controlling State is primarily responsible.\(^{335}\) ‘Control’ is intended to refer to cases where domination over the commission over the wrongful act and not merely the 'exercise of oversight', 'influence or concern'.\(^{336}\) The word 'direct' connotes *actual* direction of the wrongful action,\(^ {337}\) and not simply incitement or suggestion. In addition responsibility is attributed to the controlling State if firstly it has knowledge of the circumstances making the conduct of the action, committed by the dependent State, wrongful and secondly the act committed by the dependent State would illicit responsibility for a wrongful act if committed by the controlling State.\(^ {338}\)

In relation to the dependent State, being in a position under the direction and control of the controlling State, does not absolve it from being responsible for the commission of the wrongful act, and does not constitute an excuse under Chapter V of Part One. The dependent State is under a duty to decline to comply with the direction of the controlling State.\(^ {339}\) The defence of 'superior orders' does not exist in International Law.\(^ {340}\) There are however circumstances that can preclude the dependent State from responsibility, such as a *force majeure*, or coercion.\(^ {341}\)

12.5 **Outsourcing extraterritorial processing and applicability**

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335 ILC Articles, Commentary to article 17, para. 1.
336 ILC Articles, Commentary to article 17, para. 7.
337 Ibidem.
338 ILC Articles, Commentary to article 17, para. 8.
339 ILC Articles, Commentary to article 17, para. 9.
341 Refer to Chapter V, ILC Articles, 20 – 27.
It is recalled that in Part A, section 3.4, the facts surrounding Australia's agreement with PNG and Nauru were outlined. It was noted that Australia, in accordance with the MOUs that were entered into with PNG and Nauru, maintained responsibility for the processing of asylum claims, through its agent, the IOM. It was also evidenced that Australia effectively controlled both PNG and Nauru when refusing access to lawyers, journalists and the AHRC. In light of the level of control that Australia exerted on PNG and Nauru it can be argued that in some instances Australia can be attributed responsibility for the actions of the dependant State, as Australia controlled certain aspects of the processing of asylum seekers and denied fundamental human rights, such as having access to legal representation. In light of this, it is unnecessary to establish responsibility under Article 16.\textsuperscript{342}

\section*{13 The Responsibility of a State for the Acts of an International Organisation}

The International Law Commission's work on International organisations, unsurprisingly has taken the ILC Articles on State Responsibility as a 'source of inspiration',\textsuperscript{343} in drafting Articles relating to the responsibility of International organisations. The International Law Commission defines an international organisation as 'an organisation established by treaty or other instrument governed by international law and possessing its own international legal personality'.\textsuperscript{344} Although this thesis is not concerned with the responsibilities of international organisations under International law, it is of relevance when examining the attribution of responsibility of States for the actions of international organisations. It is noteworthy that even if an international organisation is found to be responsible for an internationally wrongful act, this does not exclude the existence of parallel responsibility of other subjects under International Law.\textsuperscript{345}

\begin{footnotes}
\item[342] It is noted that this thesis is not concerned with the responsibilities of both Nauru and PNG.
\item[343] Report of the ILC, 54\textsuperscript{th} Session, 2002, para. 473.
\item[344] Report of the ILC, 55\textsuperscript{th} Session, 2003, draft article 2.
\item[345] Report of the ILC, 55\textsuperscript{th} Session, 2003, draft article 3, commentary, para. 8.
\end{footnotes}
The draft articles establish that a State may be held responsible for the conduct of an international organisation, depending on the facts of the case.\textsuperscript{346} Attribution of responsibility to a State for the actions of an international organisation can occur when a State aids or assists in the commission of an internationally wrongful act by the organisation,\textsuperscript{347} or when it directs and controls the commission of such an act.\textsuperscript{348}

14 Summary of Chapter

It is reasonable to discern therefore that Australia's example of extraterritorial processing is objectionable on multiple grounds as it;

1. Equates to a form of penalisation, in accordance with Article 31 of the \textit{Refugee Convention};
2. Creates a discriminatory system, between the rights of detainees onshore in Australia and offshore in PNG and Nauru;
3. Increases the risk of \textit{refoulement} in contravention of Article 33 of the \textit{Refugee Convention};
4. Breaches Article 9 (1) of the ICCPR on the basis that detention is arbitrary;
5. Breaches Article 9 (4) of the ICCPR on the basis that there is no effective right to \textit{habeas corpus}.

Australia's Responsibilities

Despite certain arguments suggesting that a legal black hole exists in relation to the extraterritorial responsibilities of a State, this thesis clearly outlines that States are in fact governed by law when they act extraterritorially.

It is established that;

\begin{itemize}
\item \textsuperscript{346} Report of the ILC, 57\textsuperscript{th} Session, 2005, draft article 16.
\item \textsuperscript{347} Report of the ILC, 58\textsuperscript{th} Session, 2006, draft article 25.
\item \textsuperscript{348} Report of the ILC, 58\textsuperscript{th} Session, 2006, draft article 26.
\end{itemize}
1. Australia must ensure the rights of asylum seekers are protected in pursuance of the *Refugee Convention*, and that these obligations are applicable extraterritorially.

2. Australia is bound by the provisions of the ICCPR when processing of asylum seekers takes place offshore.

3. Australia can be held responsible for the actions of International Organisations.

4. Australia can be attributed responsibility for the actions of another State, when they control or direct actions that result in an internationally wrongful occurrence.
Conclusion

Outsourcing Immigration Detention Centres to private actors is not conducive to protecting the human rights of detainees, if there is little transparency and accountability of the private actors involved. As demonstrated, privatisation and outsourcing processes can have enduring effects, which make it difficult for the State to revert administering and managing IDCs to the State. This thesis argues that Australia has experienced lock in effects. The profit motive that drives large multinational corporations is in direct conflict with the human rights of detainees when their liberty is deprived. Outsourcing arrangements in IDCs create an environment where the interests of commercial confidentiality supersedes those of asylum seekers. A lack of transparency diminishes the ability of civil society and the media to scrutinise the commercial arrangement between the State and the private contractor. In brief any form of the privatisation of Immigration Detention Centres should be avoided if there are not in place strong monitoring bodies to hold both the private actor and the government to account. Sweden provides a positive example of where a State has returned to the State the responsibility of running IDCs and Australia should strive to do the same.

It has been established that pursuant to the ILC Article 5 Australia can be held responsible for the actions of private actors within IDCs, as it would appear that Serco has been empowered by national law to exercise governmental authority. In addition it can be sufficiently argued that Serco has been delegated governmental authority, as the power to deprive a person's liberty is regarded as a governmental function, regardless as to whether is has been delegated.

Extraterritorial processing further complicates an already complex situation. It has already been established that there is a serious lack of transparency regarding outsourced arrangements relating to IDCs within Australia. This does not bode well, when IDCs are therefore outsourced offshore. This was evidenced, during the years of
the Pacific solution, when Australia through its local agents, denied lawyers, journalists and the National Human Rights Institution from accessing IDCs in Nauru and PNG. Therefore it has been clearly asserted that transparency is fundamental to ensuring that the human rights of asylum seekers, being detained, are protected.

It has also been demonstrated that although extraterritorial processing raises complex legal issues as to the responsibility of various actors, it is clear that States are governed by the law, no matter where they operate. States are bound by legal obligations when they act extraterritorially and cannot obfuscate their responsibilities when they outsource immigrant detention centres to private actors and International Organisations.
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Outsourcing responsibility: a case study of Australias practice of outsourcing immigration detention centres

Blanco Smith, Marco

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