

European Master's Degree in Human Rights and Democratisation



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 State¹ 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 2007.² 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?*³

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,⁸ 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.⁹

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.¹⁰ McBeth argues that privatisation has shifted the State's primary role to a supervisory duty to protect human rights.¹¹ 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.¹²

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.

11 McBeth, 2004, p. 153.

12 Lemke, 2005, p. 11.

Menz argues that outsourcing as a phenomenon is more likely to occur in States where 'neoliberalisation is most advanced'.¹³ He warns that once privatisation processes are implemented, self-reinforcing dynamics are created and 'lock in effects' materialise.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.¹⁵ Interestingly it is asserted that privatisation processes are also partly influenced by financial and political blame avoidance strategies¹⁶ 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'.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'.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.¹⁹ The types of private actors that have been contracted to provide services

13 Menz, 2011, p. 3.

14 Ibidem.

15 Menz, 2011, p. 29.

16 Menz, 2011, p. 3.

17 Ibidem.

18 Menz, 2011, p. 20.

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

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>.

20 Flynn & Cannon, 2009, p. 4.

21 Ibidem.

22 Mitchell, 2001, p. 8.

23 Mitchell, 2001.

24 Refugee Council of Australia, 'Alternatives to Detention: The Swedish Model of Detention', 2000.

25 Cf. Refugee Council of Australia, 'Alternatives to Detention: The Swedish Model of Detention', 2000.

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 government²⁶, announced that it intended to privatise the operations of Australia's IDCs to ensure more flexible and cost effective services.²⁷ Until the end of 1997 security services in IDCs were managed by Australian Protective Services²⁸ on behalf of The Department of Immigration, Multiculturalism and Indigenous Affairs (DIMIA).²⁹ In February 1998 Australasian Correctional Services Pty Ltd (ACS)³⁰ was formally contracted for the provision of detention services.³¹ ACS and

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.

27 Molenaar & Neufeld, 2003, p. 129.

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.

31 Australian National Audit Office, Management of the Detention Centre Contracts – Part A, 2003 – 2004, at para. 2.34.

DIMIA entered into a contract, which stipulated that ACS was to provide services at eight detention facilities³² and entered into an occupation licence agreement that authorised ACS to use the detention facilities.³³ 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.³⁴

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.³⁵ In addition the Flood Report³⁶ 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)³⁷ developed the Immigration Detention Guidelines so as;

32 ACS was contracted to provide detention facility services at Port Hedland Villawood, Maribyrong, Perth, Woomera, Curtin, Baxter and Christmas Island.

33 Australian National Audit Office, Management of the Detention Centre Contracts – Part A, 2003 – 2004, at para. 2.35.

34 Australian National Audit Office, Management of the Detention Centre Contracts – Part A, 2003 – 2004, at para. 5.

35 Commonwealth Ombudsman, 'Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres', 2001, p. 9.

36 Flood, Report of Inquiry into Immigration Detention Procedures, 2001, paras. 6.1 – 7.8.

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 (DIMIA and ACM) and relevant non-governmental agencies in the development of acceptable minimum standards for immigration detention in Australia.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.

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)³⁹ on 27 August 2003,⁴⁰ 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'.⁴¹

38 Human Rights and Equal Opportunity Commission, 'Immigration Detention Guidelines', 2000, p. 3.

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.

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.

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.

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

42 The Public Interest Advocacy Centre, 'Immigration detention in Australia: the loss of decency and humanity', Submission to the People's Inquiry into Immigration Detention, 2006, p. 6.

43 The Palmer inquiry was opened to investigate the circumstances leading to the detention of Cornelia Rau, who is a German citizen and an Australian permanent resident, for the period of eleven months.

44 Palmer, Department of Immigration and Citizenship, Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, 2005, p. xiii.

45 Roche, Department of Immigration and Citizenship, Detention Services Contract Review, 2006, p. 8

46 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. 3.33.

47 The Brotherhood of St. Laurence, Rights & Accountability in Development (UK), The Human Rights Council of Australia, Children Out of Detention and the International Commission of Jurists (Switzerland).

48 The National Contact Point is a government appointee who is responsible for encouraging observance

allegations⁴⁹ 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.⁵⁰ After the mediation process had taken place a statement was released outlining GSLs *voluntary* agreement to acknowledge that it has responsibilities and should be held accountable for the following:⁵¹

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

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

6.3 A New Direction?

In 2006 prior to The Australian Labor Party (ALP) taking over as the government at the 2007 federal election, Tony Burke MP⁵⁵ 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',⁵⁶ and also proclaimed in January 2006 that privatisation of IDCs 'was a

of the OECD Guidelines for Multinational Enterprises. The guidelines are voluntary standards and principles. In 2006, Gerry Antioch was the Australian National Contact Point.

49 The submission made to the Australian National Contact Point alleged, amongst other allegations, that GSL Australia was complicit in violating the *Convention on the Rights of the Child* by detaining children; was acquiescing in the mandatory detention of asylum seekers and as a result complicit in contravening Article 9 of the *International Covenant for Civil and Political Rights*, Article 9 of the *Universal Declaration of Human Rights*, Article 31 of the *1951 Convention relating to the Status of Refugees*. Refer to Brotherhood of St. Laurence, Immigration detention, Submission to the Parliament of Australia Joint Standing Committee on Migration, July 2008, p. 3.

50 Brotherhood of St. Laurence, Immigration detention, Submission to the Parliament of Australia Joint Standing Committee on Migration, p. 3.

51 Australian National Contact Point Statement, GSL Australia specific instance, April 2006, at para. 2.

52 Australian National Contact Point Statement, GSL Australia specific instance, April 2006, at para. 3.

53 Australian National Contact Point Statement, GSL Australia specific instance, April 2006, at paras. 6 – 13.

54 Australian National Contact Point Statement, GSL Australia specific instance, April 2006, at para. 14.

55 Tony Burke is now the Minister for Sustainability, Environment, Water, Population and Communities.

56 Cf. Chambers, 'Serco: Immigration's outsourced elephant in the room', 10 May 2011, ABC news, accessed from www.abc.net.au/unleashed/1233090.html on 15 May 2011.

bad idea from the start. It should not have taken place. It should not be continued'.⁵⁷

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.⁵⁸ 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'.⁵⁹ 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.

57 Black, 'Private contractor Serco to run detention centres', 1 July 2009, Crikey, accessed from www.crikey.com.au/2009/07/01/private-contractor-serco-to-run-detention-centres on 3 March 2011.

58 Cf. Chambers, 'Serco: Immigration's outsourced elephant in the room', 10 May 2011, ABC news, accessed from www.abc.net.au/unleashed/1233090.html on 15 May 2011.

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.

⁶¹ Topsfield, 'Labor breaks detention promise', The Age, 20 January 2009, accessed from www.theage.com.au/national/labor-breaks-detention-promise-20090119-7ku5.html on 11 March 2011.

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

⁶³ Senator Hanson-Young, 'Immigration detention services must be under public control', Greens Media Release, 1 April 2009, accessed from <http://sarah-hanson-young.greensmps.org.au/services-must-be-under-public-control> on 11 March 2009.

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 estimates⁶⁴, 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 Ltd⁶⁵ 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 DIAC's 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.

68 The Department of Immigration and Citizenship, accessed from <http://www.immi.gov.au/managing-australias-borders/detention/services/provider-contract.htm>, on 5 July 2011.

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,⁷⁰ 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.⁷¹ Nevertheless Serco is liable only up to \$75 million, because the insurance arrangement has been capped at this sum.⁷²

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.⁷³ 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.⁷⁴ 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.⁷⁵ 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-Magor⁷⁶ responded;

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

70 Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 44.

71 Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 42.

72 Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 44.

73 Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 21.

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.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;

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.⁷⁸

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.⁷⁹ Despite this aspect of the employment contract there have been recent cases of *whistleblowers* contacting the media to express their concerns

⁷⁷ Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2011, p. 23.

⁷⁸ Ibidem.

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.⁸⁰ 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.⁸¹ 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.⁸²

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.⁸³ 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.⁸⁴ 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'.⁸⁵

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.

81 ABC News, 'Unauthorised media on par with bomb threats:Serco', 18 May 2011, accessed from www.abc.net.au/news/stories/2011/05/18/3220131.htm?section=justin on 18 May 2011.

82 Taylor, Paige, 'Company closes ranks on leaks', The Australian, 2 May 2011, accessed from <http://www.theaustralian.com.au/news/nation/company-closes-ranks-on-leaks/story-e6frg6nf-1226048005684> on 2 May 2011.

83 AHRC, '2011 – Immigration Detention in Leonora', 2011, paras. 8.1, 8.2.

84 ABC News, 'Poor staff training blamed for Villawood riot', 22 April 2011, accessed from www.abc.net.au/news/stories/2011/04/22/3198546.htm?section=justin on 22 April 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.⁸⁶ 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.⁸⁷

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.⁸⁸ 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 services⁸⁹ 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;

www.abc.net.au/news/stories/2011/05/18/3220131.htm?section=justin on 18 May 2011.

86 Farrell, Paul, & Loewenstein, Antony, 'No transparency in Serco dealings with contractors', Crikey news, 2 November 2010, accessed from www.crikey.com.au/2010/11/02/no-transparency-in-serco-dealings-with-contractor on 5 May 2011.

87 Hainke, Nadja, 'Detainee claims guards hit him', 12 January 2011, accessed from http://www.ntnews.com.au/article/2011/01/12/206331_ntnews.html on 18 May 2011.

88 Cf. Farrell, Paul, & Loewenstein, Antony, 'No transparency in Serco dealings with contractors', Crikey news, 2 November 2010, accessed from www.crikey.com.au/2010/11/02/no-transparency-in-serco-dealings-with-contractor on 5 May 2011.

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.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'.⁹¹ In addition DIAC undertakes that performance standards are monitored through 'robust performance' management.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 DIAC's 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.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

90 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.

91 Ibidem.

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.

93 Australian National Audit Office, accessed from <http://www.anao.gov.au/About-Us> on 5 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.⁹⁴
2. Documenting its strategies for detention service function and develop a robust contract management plan.⁹⁵
3. Undertaking sound research into immigration detention service.⁹⁶

8.2 ***Human Rights Concerns***

Australian Human Rights Commission (AHRC) – formerly Human Rights and Equal Opportunity Commission (HREOC)

The AHRC has published numerous reports regarding IDCs and the treatment of detainees.⁹⁷ In 2000 HREOC drafted the Immigration Detention Guidelines, which

94 Recommendation 1, 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. 3.28.

95 Recommendation 2, 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. 3.35.

96 Recommendation 3, 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. 3.70.

97 Human Rights and Equal Opportunity Commission, '1998-99 Review of Immigration Detention Centres', HREOC, Canberra, 1998; Human Rights and Equal Opportunity Commission, 'Immigration Detention Centre Guidelines', HREOC, Canberra, 2000; Human Rights and Equal Opportunity Commission, 'A Last Resort? Report of the National Inquiry into Children in Immigration Detention', HREOC, Canberra, 2004; Human Rights and Equal Opportunity Commission, 'Inspection of Immigration Detention Centres', HREOC, Canberra, 2006; Human Rights and Equal Opportunity Commission, 'Summary of Observations following the Inspection of Mainland Immigration Detention

draw on relevant international minimum standards, detailing what is required for the humane detention to be consistent with International Human Rights obligations⁹⁸ 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.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.¹⁰⁰

There are several independent bodies that are granted permission to monitor conditions within IDCs in Australia.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

Facilities', HREOC, Canberra, 2007; Australian Human Rights Commission, '2008 Immigration Detention Report', AHRC, Canberra, 2008; Australian Human Rights Commission, '2011 Immigration Detention at Villawood', AHRC, Canberra, 2011; Australian Human Rights Commission, '2011 Statement on Immigration Detention in Leonora', AHRC, Canberra, 2011.

98 The relevant international law is set out in the; *Convention Relating to the Status of Refugees 1967*; *Protocol Relating to the Status of Refugees 1967*; *International Covenant on Civil and Political Rights 1966*; *International Covenant on Economic, Social and Cultural Rights 1966*; *International Convention on the Elimination of All Forms of Racial Discrimination 1969*; *Convention on the Elimination of All Forms of Discrimination Against Women 1979*; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987*; *Convention on the Rights of the Child*.

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*.

100 Australian Government, Department of Immigration and Multicultural Affairs, Response to the Human Rights and Equal Opportunity Commission's Immigration Detention Guidelines, 2000.

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.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'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'.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;

1. Monitoring of standards in Immigration Detention:

A. Minimum standards for conditions and treatment of detainees, which should be based on relevant international human rights standards, should be codified in legislation.¹⁰⁵

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.¹⁰⁶

2. Length and uncertainty of Detention – Australia should repeal mandatory detention laws.¹⁰⁷

102 Australian Human Rights Commission, 'Immigration detention report – December 2008', p. 18.

103 The 'Pacific Solution' is discussed in more detail in chapter 3.

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

105 Australian Human Rights Commission, 'Immigration Detention Report – December 2008', 2008, p. 5.

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.

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 to 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 2002¹¹²

Nations High Commissioner for Refugees Conclusion No. 44 states that where detention of asylum seekers is considered necessary, it should only be used to verify identity; to determine the elements on which the asylum claim is based; to deal with the cases where refugees or asylum seekers have destroyed their travel and/or identification 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.

108 Australian Human Rights Commission, 'Immigration Detention Report – December 2008', 2008, p. 5.

109 Australian Human Rights Commission, 'Immigration Detention Report – December 2008', 2008, p. 8.

The *standard minimum rules for the Treatment of Prisoners* (1955) rule 33(a) stipulates that restraints should be removed when the prisoner appears before a judicial or administrative authority. These rules apply to all persons in any form of detention.

110 Australian Human Rights Commission, 'Immigration Detention Report – December 2008', 2008, p. 13.

111 Australian Human Rights Commission, 'Statement on Immigration Detention in Leonora', 2011.

112 Report of Justice P. N. Bhagwati, 'Human Rights and Immigration Detention in Australia', Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia 24 May to 2 June 2002. Justice Bhagwati is a former Chief Justice of India and visited Australia on behalf of the United Nations High Commissioner for Human Rights, Mrs. Mary Robinson. Justice Bhagwati's visit to Australia to inspect IDCs and the treatment of asylum seekers coincided with a visit by the Working Group of the Commission on Human Rights on Arbitrary Detention.

After inspecting the operational detention facilities in Woomera¹¹³ and the Baxter detention centre¹¹⁴ 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.¹¹⁵

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

B) Report of the Working Group on Arbitrary Detention (WGAD) 2002

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.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'.¹¹⁸ WGAD cited numerous examples of prerogatives of public powers that were exercised by ACM, being;

1. Carrying out surveillance of detainees.

113 The Woomera immigration detention centre was operational from 1999 to 2003 when it was closed.

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.

115 Bhagwati, 2002, p. 13.

116 Chapter 3 examines in more detail Australia's obligations pursuant to the ICCPR.

117 Refer to section 2.1 of this thesis, which relates to ACM.

118 Report of the Working Group on Arbitrary Detention, 2002, p. 17.

2. Exercising the power to discipline.
3. Maintaining order
4. Determining as to whether legal representatives are granted permission to visit detainees.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".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 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

¹¹⁹ Report of the Working Group on Arbitrary Detention, 2002, p. 17.

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.¹²¹
4. The Australian government is committed to the *key immigration values* and is implementing these values.¹²²

8.4 *Civil Society Concerns*

Transparency and Visibility

Submissions were made by various organisations that the privatisation of IDCs had hindered accountability and transparency¹²³ and The Australian Council of Heads of Social Work stated their concerns of the privatisation process and that the contractual framework discouraged transparency;

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.¹²⁴

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'.¹²⁵

¹²¹ Chapter 4.2.6.2 discusses the ICCPR in more detail.

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.

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.

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.

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,

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.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.¹²⁷

9 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.

para. 3.105.

¹²⁶Department of Immigration and Citizenship, submission 129, 11 September 2008, p. 15.

¹²⁷The 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.

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.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.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.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.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.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

128ILC Articles, Commentary to article 5, para. 1.

129ILC Articles, Commentary to article 5, para. 2.

130ILC Articles, Commentary to article 5, para. 2.

131ILC Articles, Commentary to article 5, para. 3.

132ILC Articles, Commentary to article 5, para. 5.

which does not encompass governmental authority.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.

11.2 Travaux Préparatoires

Although the *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.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.¹³⁵ Therefore the *travaux* suggests that 'governmental authority' encompasses an autonomous institution that exercises administrative or legislative public functions.

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

¹³³Ibidem.

¹³⁴Report of the ILC, 26th Session, *ILC Yearbook 1974*, Vol. II(1), 281.

¹³⁵Cf. Momtaz, Djamchid, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority', p 244. in Crawford, James, Pellet, Alain, & Olleson, Simon, (eds.), *The Law of International Responsibility*, Oxford: Oxford University Press, 2010.

made to the Italian State. In the matter of *Dame Mossé*¹³⁶ the Commission found that the Italian State could be found responsible for the actions of a non-state entity¹³⁷, 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.¹³⁸

The Iran-United States Claims Tribunal followed this reasoning in the *Hyatt*¹³⁹ 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.¹⁴⁰ In addition in the *Nicaragua*¹⁴¹ case the ICJ was concerned with entities, referred to as 'Unilaterally Controlled Latino Assets'¹⁴², 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.¹⁴³

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

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*.

139 *Hyatt International Corporation v Government of the Islamic Republic of Iran* (1985) 9 *Iran-US CTR* 72.

140 *Hyatt International Corporation v Government of the Islamic Republic of Iran* (1985) 9 *Iran-US CTR* 72, at para. 93.

141 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, *ICJ Reports 1986*, p 14.

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.

143 Separate opinion of Judge Ago, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, *ICJ Reports 1986*, pp. 187 – 188, para 15.

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 2005/2006,¹⁴⁴ 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 *Financial Management and Accountability Act 1997* (FMA Act) and the *Financial Management and Accountability Regulations 1997* (FMA Regulations) which govern the management of Commonwealth money and property.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.¹⁴⁶

¹⁴⁴The 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.

¹⁴⁵The 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

¹⁴⁶Section 44, 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.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 law¹⁴⁸, 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

and Accountability Regulations 1997.

147Department 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.

148Section 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 Leonora¹⁴⁹ 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.

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.¹⁵⁰ 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.¹⁵¹ 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'.¹⁵²

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.¹⁵³

12.2 Travaux Préparatoires

¹⁵⁰Article 8, ILC Articles, commentary, para. 1.

¹⁵¹See *The 'Zafiro'*, *R.I.A.A.*, vol. VI, p. 160 (1925); *Stephens*, *R.I.A.A.*, vol. IV, p. 265 (1927), *Lehigh Valley Railroad Company, and others (USA) v. Germany (Sabotage Cases): 'Black Tom' and 'Kingsland' incidents*, *R.I.A.A.*, vol. VIII, p. 84 (1930); and *R.I.A.A.*, vol. VIII, p. 225 (1939), at p. 458.

¹⁵²Article 8,, ILC Articles, commentary, para. 2.

¹⁵³Article 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.¹⁵⁴ 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*¹⁵⁵ which consisted of the 'planning, direction and support' given by the United States to the Nicaraguan *contras*,¹⁵⁶ 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.¹⁵⁷

Despite the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić*¹⁵⁸ 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

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

156 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, *ICJ Reports 1986*, p. 51, para. 86.

157 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, *ICJ Reports 1986*, p. 65, para. 115.

158 *Case IT-94-1, Prosecutor v Tadić*, (1999) *I.L.M.*, vol. 38, p. 1518. For the judgment of the Trial Chamber (1997), see *I.L.R.*, vol. 112, p. 1.

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 Genocide*¹⁶⁰ 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

¹⁵⁹ Case IT-94-1, *Prosecutor v Tadić*, (1999) *I.L.M.*, vol. 38, p. 1518, at p. 1541, para. 117.

¹⁶⁰ *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. 398.

¹⁶¹ *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. 407.

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

162 *Corfu Channel Case, Judgment of April 9th, 1949: I.C.J Reports 1949, p. 4.*

163 *Corfu Channel Case. Judgment of April 9th, 1949: I.C.J Reports 1949, p. 23.*

164 *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p.3.*

165 *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 37, para. 80.*

166 Human Rights Committee, General Comment 31, 'The Nature of the General Legal Obligation: Imposed on States Parties to the Covenant', 29 March 2004, CCPR/C/21/Rev.1/Add. 13.

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

167 Human Rights Committee, General Comment 31, 'The Nature of the General Legal Obligation: Imposed on States Parties to the Covenant', 29 March 2004, CCPR/C/21/Rev.1/Add. 13, para. 8.

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.

169 Communications No. 1020/2001.

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'.

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.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

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

¹⁷²Haitian Migration Interdiction Program, Proclamation No 4865, 46 Fed. Reg. 48, 107, (1981)

¹⁷³Ibidem.

¹⁷⁴Helton, 1993, p. 325.

only 550 Haitians out of many thousands were resettled in other States.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 asylum¹⁷⁶, 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.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 prevent¹⁷⁸

¹⁷⁵Briggs, 1993, p. 1.

¹⁷⁶Pursuant 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.

¹⁷⁷Dastyari, 2007, p.97.

¹⁷⁸Khan, 2002.

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*¹⁷⁹ en route from Indonesia to Australia.¹⁸⁰ 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.¹⁸¹ The captain, who had expressed concerns for the medical condition of some of the asylum seekers on board the *Tampa*¹⁸², 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.¹⁸³ It is clear that pursuant to the Law of the Sea, there are obligations to rescue passengers on vessels in distress.¹⁸⁴ 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.¹⁸⁵

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

179Senate Select Committee on a certain Maritime Incident, 2002, p. 33.

180The *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 it 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).

181Senate Select Committee on a certain Maritime Incident, 2002, p. 1.

182The 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.

183Afeef, 2006, p.5. (4.1)

184Article 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 do so 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.'

185Marr & Wilkinson, 2003, p. 51.

Christmas Island and if the claims were found to be legitimate, those refugees would be resettled in other western States.¹⁸⁶ 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,¹⁸⁷ and so the 'Pacific solution' came into effect.¹⁸⁸ 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'.

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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',¹⁹⁰ which were subsequently excluded from the Australian migration zone. Furthermore legislative amendments¹⁹¹ 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

186UNHCR,'Australia/Tampa:UNHCR Brokering 3 point plan', 2001.

187Senate Select Committee on a certain Maritime Incident, 2002, p. 3.

188The Pacific solution is sometimes referred to as the 'Pacific plan' or the 'Pacific strategy'. Although the term refers to a range of deterrence measures, including widespread legislative changes, this thesis will focus on the extraterritorial processing of asylum seekers and the excision of territory. For further information relating to the legislative changes made, refer to Senate Select Committee on a certain Maritime Incident, 2002, p. 5.

189Australian Broadcasting Corporation (ABC) Lateline transcript, 21 November 2001.

190The excised islands were Christmas Island, Ashmore and Cartier Islands, and the Cocos (Keeling) Islands.

191Migration Act, 1958

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 visa¹⁹³ in Australia unless the Minister for Immigration¹⁹⁴ 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 necessary¹⁹⁷ 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

192Migration Act, 1958, s. 494AA.

193Migration Act, 1958, s. 36.

194Migration Act, 1958, s. 46A.

195Migration Act, 1958 s 198A.

196Prior 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.

197Kneebone, 2006, p. 697.

198Bostock, 2002, p. 293.

199Human Rights Watch, 'Australia:Next Government Must Improve Refugee Protection', 2001.

200Bostock, 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

201Oxfam, 'A Price too High: Australia's approach to asylum seekers', 2007, p. 7.

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.

205Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

certain persons on behalf of Australia²⁰⁶ and provide accommodation at two sites, known as Topside and Statehouse, for a maximum of 1200 (this was later increased to 1500) asylum seekers.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.²⁰⁸ Under the MOU Australia committed to ensuring that all the asylum seekers to be processed on Nauru will leave within six months,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;²¹⁰ compensate Nauru for any loss incurred²¹¹ and promised an additional AUD\$10 million in aid measures.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'²¹³ and Nauruan Member of Parliament, Mr Anthony Audoa stated;

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.²¹⁴

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

206Senate Select Committee on a certain Maritime Incident, 2002, at 10.33

207Senate Select Committee on a certain Maritime Incident, 2002, at 10.35

208Memorandum 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.

209Senate Select Committee on a certain Maritime Incident, 2002, at 10.34

210Senate Select Committee on a certain Maritime Incident, 2002, at 10.36

211Ibidem.

212Senate Select Committee on a certain Maritime Incident, 2002, at 10.37.

213Taylor, 2005, p. 22.

214Oxfam, 'Adrift in the Pacific', 2002, p. 23.

215The 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.

caterers and security officers²¹⁶. Major sub-contractors included Eurest Support Services and Chubb Security Pty Ltd.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 *Tampa*, and the *Aceng*.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.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 2007.²²⁰ 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.²²¹ Nauru acceded to the *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 *Refugee Convention*.

4.3 Agreement with PNG

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

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

216Chubb 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.

217Senate Select Committee on a certain Maritime Incident, 2002, at 10.82.

218On 8 September 2001, 228 asylum seekers were intercepted by the HMAS Warramunga from a vessel named *Aceng* and transported by the HMAS Manoora to Nauru.

219Human Rights Watch, 'By Invitation Only', 2002, p. 65.

220Oxfam, 'A Price too High: Australia's approach to asylum seekers', 2007, p. 56.

221Francis, 2008, p. 273.

enhanced capacity in Papua New Guinea, to address these issues.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.²²³ Australia bore all the costs of establishing and operating the detention facility²²⁴ and the centre became operational on 21 October 2001.²²⁵ 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.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.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 Sisalem²²⁸, left the detention centre in May 2004.²²⁹ 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

222Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

223Kneebone, 2006, p. 709.

224Senate Select Committee on a certain Maritime Incident, 2002, at 10.52.

225Senate Select Committee on a certain Maritime Incident, 2002, at 10.53.

226Senate Select Committee on a certain Maritime Incident, 2002, at 10.57.

227Senate Select Committee on a certain Maritime Incident, 2002, at 10.59.

228In 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 *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.

229Burnside, 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.

²³¹Transcript of Evidence, Estimates, Senate Legal and Constitutional, 22 February 2002, p. 497.

²³²Oxfam Community Aid Abroad, 2002, p. 14.

²³³Human Rights Watch, 2002, p. 65.

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

²³⁴Von Doussa, 2007, p. 41.

²³⁵Refer to Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', 2001.

²³⁶Oxfam, 2007, p. 14.

²³⁷von Doussa, 2007, p. 41.

²³⁸See 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),²³⁹ 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*.²⁴⁰ 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 Australia 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;

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.

²⁴¹Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues; Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues.

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.²⁴² 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.²⁴³

A doctrinal analysis of extraterritorial jurisdiction is generally categorised as being either prescriptive jurisdiction or enforcement jurisdiction.²⁴⁴ It is sometimes noted that 'judicial jurisdiction' comprises a third category of jurisdiction.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷ However, according to Milanovic, the entire law of jurisdiction is primarily based on exceptions to the principle of territoriality.²⁴⁸

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

²⁴²Skogly & Gibney, 2002, p. 782.

²⁴³Berman, 2003, p. 4.

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.

²⁴⁷Lowe, 2007, pp. 184 - 188.

²⁴⁸Milanovic, 2008, p. 421.

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.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.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.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.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.²⁵³

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 *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

249Roxtrom, 2005, p. 112.

250Wilde, 2005, p. 802.

251 Novak, 2010, p. 14.

252Wilde, 2005, p. 798.

253Gammeltoft-Hansen, 2010, pp. 80 – 81.

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,

²⁵⁴UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1992, para. 28.

²⁵⁵Goodwin-Gill, 2007, p. 27.

²⁵⁶Cf. Francis, 2008, p. 275.

²⁵⁷Hathaway, 2005, pp. 63 – 67.

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

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.

1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons

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',²⁶⁰ and argued that the a 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.²⁶¹ 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.²⁶² 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 1951²⁶³ and by Mr Herment of Belgium.²⁶⁴

260 Mr. Colemar of France, UN Doc. A/CONF.2/SR.13.

261 UN Doc. A/CONF.2/SR.14, pp. 10 – 11.

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

265 UN Doc. A/CONF.2/SR.13, pp. 13 – 15.

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 1986²⁷¹ 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 Committee²⁷³ 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 government²⁷⁶ 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.

275 UNHCR, 'Revised Guidelines on the Detention of Asylum Seekers', February 1999.

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 penalisation²⁷⁸ 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,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',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.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.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 31.²⁸³ 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

Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2004 [25]
278The 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.
279UNHCR 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].
280Kneebone, 2006, p. 710.
281Goodwin-Gill, 2001, p. 9 and Hathaway, 2005, pp. 394 – 395.
282Goodwin-Gill, 2001, p. 33.
283Kneebone, 2006, p. 712.

administrative grounds'.²⁸⁴

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 Problems²⁸⁵

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'.²⁸⁶ Consequently there is no obligation for States to receive refugees under Article 33 of the Refugee

²⁸⁴Security Commissioner in case number CIS 4439/98, 25 November 1999 cited in Goodwin-Gill, 2001, p. 18.

²⁸⁵The 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.

²⁸⁶Ad Hoc Committee on Statelessness and Related Problems, Statement of Mr. Chance of Canada, UN Doc. E/AC.32./SR.21, Feb 2, 1950, at 7.

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'.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 *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 *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'.²⁸⁸

It is important to understand the absence of a requirement of authorisation of entry in Article 33. The original prohibition on *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'.²⁸⁹ Nevertheless this approach was not adopted by drafters at the *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.²⁹⁰

Expulsion and non-admittance

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

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

²⁸⁷Ad 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.

²⁸⁸UN Doc. E/AC.32/SR.40, para. 33.

²⁸⁹Cf. Hathaway, 2005, p. 302.

²⁹⁰Ad 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*.

291Ad Hoc Committee on Statelessness and Related Problems, Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/L.22, Feb.1, 1950, at 11-12.

292Ad Hoc Committee on Statelessness and Related Problems, Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/L.22, Feb.1, 1950, at 12-13.

293UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.

294UN Doc. E/CONF.2/SR.16, p. 6.

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 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.

²⁹⁷ Executive Conclusion No. 15. (XXX) Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues; Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues), 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.²⁹⁸ 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,²⁹⁹ the pacific solution not only created a problematic situation, but an environment where the rights of asylum seekers were not sufficiently protected.³⁰⁰

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.³⁰¹ Consequently this leads to the possibility that offshore processing increases the incidents of *refoulement*, as errors might be made in the decision making process.

298E Lauterpacht and D Bethlehem, 2003, p. 122.

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 education, 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.

302 UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 2007, at 29.
303 Ibidem.

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

³⁰⁴ UN Doc. E/CN.4/21. Annex B (Art. 10)

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

³⁰⁷ Cf. Novak, 2005, p.219.

³⁰⁸ Cf. Novak, 2005. p. 224.

the Anglo-American principle of due process of law.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 *A v Australia*³¹⁰ a period of four years was considered to be arbitrary, and in *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).³¹¹

Right to Habeas Corpus

Article 9 (4) stems from the Anglo-American principle of *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.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

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

310 *A v Australia* No. 560/1993, paras. 9.3, 9.4.

311 *C v Australia* No. 900/1999, para. 8.2. Also refer to the cases *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; *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.

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'.³¹³ Therefore as confirmed in the decision of *Vuolanne v Finland*, a military court is considered to be a 'court of justice' and accordingly satisfies Article 9 (4).

Interpreting the *ordinary meaning* of Article 9 (4) would suggest that the Australian practice of mandatory detention would breach the right to *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 1.³¹⁴

Article 7

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.

Article 10

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.³¹⁵ Torture is also prohibited by customary international law and is

³¹³ Gen C 8/16, para. 14.

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.

³¹⁵ For example: Article 5, *Universal Declaration of Human Rights 1948*, Article 7 in conjunction with Article 2, *ICCPR*.

considered as being *jus cogens* pursuant to Article 53 of the *Vienna Convention on the Law of Treaties*.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'.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.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.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

316 Cf. Simma & Alston, 1992.

317 *Domukovsky et al v Georgia*, Nos. 623, 624, 626, 627/1995, para. 18.6

318 For example *Edwards v Jamaica*, No 529/1993; *Smith & Stewart v Jamaica*, No 668/1995; *Brown v Jamaica* 775/1997.

319 *Mukong v Cameroon*, No. 458/1991, para. 9.3.

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.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.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.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'.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.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.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

320 Human Rights Committee, General Comment No. 31, para. 10.

321 See the decisions of the Human Rights Committee in *Lopez Burgos v Uruguay*, 1981, at para. 12.3, and *Celiberti de Casariego v Uruguay*, 1981, at para 10.3.

322 *Lopez v Uruguay*, 1981, at para. 12.3.

323 Wilde, 2005, p. 792.

324 Concluding Observations of the Human Rights Committee, United States of America, 3 October 1995, at para 284.

325 Wilde, 2005, p. 805.

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.³²⁶ The ICJ has observed that;

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.³²⁷

12 ILCs Articles on State Responsibility for Internationally Wrongful Actions

12.1 Article 16

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:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

12.2 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

³²⁶ The International Court of Justice in *Case concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* (2005) ICJ General list No. 116, 19 December 2005, at para. 216. Also refer to the Advisory opinion of the International Court of Justice in *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Gen list No. 131, 9 July 2004, at para 111.

³²⁷ Advisory opinion of the International Court of Justice in *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Gen list No. 131, 9 July 2004, at para 109.

'essential facility' or 'financing the activity in question'.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.³²⁹ Although a State is not bound by the obligations of another State, in accordance with the *Vienna Convention*,³³⁰ a 'State cannot do by another what it cannot do by itself'.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.³³²

In the *Bosnia Genocide* case the ICJ referred to Article 16 as 'reflecting a customary rule'.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.³³⁴

12.3 Article 17

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

328 ILC Articles, Commentary to article 16, para. 1.

329 Ibidem.

330 Article 34, 35 of the Vienna Convention on the Law of Treaties.

331 ILC Articles, Commentary to article 16, para. 6.

332 ILC Articles, Commentary to article 16, para. 3.

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.

334 *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, paras. 423 – 424.

- (b) the act would be internationally wrongful if committed by that State.

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

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.

340 Ibidem.

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 16.³⁴²

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',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'.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.³⁴⁵

342 It is noted that this thesis is not concerned with the responsibilities of both Nauru and PNG.

343 Report of the ILC, 54th Session, 2002, para. 473.

344 Report of the ILC, 55th Session, 2003, draft article 2.

345 Report of the ILC, 55th Session, 2003, draft article 3, commentary, para. 8.

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.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,³⁴⁷ or when it directs and controls the commission of such an act.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 *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 *refoulement* in contravention of Article 33 of the *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 *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;

346 Report of the ILC, 57th Session, 2005, draft article 16.

347 Report of the ILC, 58th Session, 2006, draft article 25.

348 Report of the ILC, 58th Session, 2006, draft article 26.

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 an 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 it 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.

Bibliography

Books

Alston, Philip (ed.), *Non-State Actors and Human Rights*. Oxford: Oxford University Press, 2005.

Ryan, Bernard & Mitsilegas, Valsamis (eds.), *Extraterritorial Immigration Control*. Leiden: Martinus Nijhoff Publishers, 2010.

Berman, Franklin, 'Jurisdiction: The State', pp. 2 – 15 in Patrick Capps & Malcolm Evans & Stratos Konstandinidis, (eds.), *Asserting Jurisdiction: International and European Legal Perspectives*. Portland: Hart Publishing, 2003.

Brennan, Frank., *Tampering with Asylum*. St Lucia: University of Queensland Press, 2003.

Brownlie, Ian., *Principles of Public International Law*. Oxford: Oxford University Press, 1998.

Burnside, Julian, 'What the Government Will Do If They Can Get Away With It', pp. 9 – 20 in Susan Aykut & Jessie Taylor, (eds.), *Seeking Asylum in Australia: 1995 – 2005 Experiences and Policies*. Clayton: Monash University, 2006.

Clapham, Andrew., *Human Rights in the Private Sphere*. Oxford: Oxford University Press, 1993.

Clapham, Andrew., *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006.

Coomans, Fons & Kamminga, Menno (eds.), *Extraterritorial Application of Human Rights Treaties*. Antwerp: Intersentia, 2004.

Cornelisse, Galina., *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty*. Leiden: Martinus Nijhoff Publishers, 2010.

Craven, Matthew., *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*. Oxford: Clarendon Press, 1995.

Crawford, James, Pellet, Alain, & Olleson, Simon, (eds.), *The Law of International Responsibility*. Oxford: Oxford University Press, 2010.

Crawford, James., *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries*. Cambridge: Cambridge University Press, 2002.

Donnelly, Jack., *Universal Human Rights in Theory and Practice*. New York: Cornell University Press, 2003.

Fernandes, Deepa., *Targeted: Homeland Security and the Business of Immigration*. New York: Seven Stories Press, 2007.

Gammeltoft-Hansen, Thomas, 'Growing Barriers: International Refugee Law' pp. 55 – 81 in Mark Gibney & Sigrun Skogly, (eds.), *Universal Human Rights and Extraterritorial Obligations*. Philadelphia: University of Pennsylvania Press, 2010.

Gammeltoft-Hansen, Thomas., *Access to Asylum*. Aarhus: Aarhus University, 2009.

Goodwin-Gill, Guy., *The Refugee in International Law*. Oxford: Oxford University Press, 1983.

Goodwin-Gill, Guy, & McAdam, Jane., *The Refugee in International Law*. 3rd ed. Oxford: Oxford University Press, 2007.

Hathaway, James., *The Rights of Refugees Under International Law*. Cambridge: Cambridge University Press, 2005.

Higgins, Rosalyn, 'The Legal Bases of Jurisdiction', pp. 3 – 14 in Cecil Olmstead (ed.), *Extra-territorial Application of Laws and Responses Thereto*, Oxford: International Law Association/ESC Publishing Lim, 1984.

Kneebone, Susan, 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The Safe Third Country Concept', pp. 129 - 139 in Jane McAdam (ed.), *Forced Migration, Human Rights and Security*, Oxford: Hart Publishing, 2008.

Kneebone, Susan, 'The Australian Story: Asylum seekers outside the law', pp. 171 – 227 in Susan Kneebone (ed.), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*. Cambridge: Cambridge University Press, 2009.

Lauterpacht, Elihu & Bethlehem, Daniel, 'The scope and content of the principle of *non-refoulement*: Opinion', pp. 87 – 177 in Erika Feller, Volker Turk, Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, 2003.

Lowe, Vaughan, 'Jurisdiction', pp. 335 – 360 in Malcolm Evans (ed.), *International Law, 2nd edition*, Oxford: Oxford University Press, 2006.

Lowe, Vaughan., *International Law*. Oxford: Oxford University Press, 2007.

Marr, David, & Wilkinson, Marian., *Dark Victory*. Crows Nest: Allen & Unwin, 2003.

McBeth, Adam., *International Economic Actors and Human Rights*. Oxon: Routledge, 2010.

Molenaar, Bente & Neufeld, Rodney, 'The Use of Privatized Detention Centres for Asylum Seekers in Australia and the UK', pp. 127 – 139 in Andrew Cole, Allison Campbell & Rodney Neufeld, (eds.), *Capitalist Punishment Prison Privatization & Human Rights*. Atlanta: Clarity Press Inc., 2003.

Novak, Manfred, 'Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective' pp. 11-29 in Mark Gibney & Sigrun Skogly, (eds.), *Universal Human Rights and Extraterritorial Obligations*. Philadelphia: University of Pennsylvania Press, 2010.

Sepúlveda, Maria., *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*. Antwerp: Intersentia, 2003.

Skogly, Sigrun., *Beyond National Borders: States' Human Rights Obligations in International Cooperation*. Oxford: Intersentia, 2006.

Verkuil, Paul., *Why Privatization of Government Functions Threatens Democracy and What We Can Do About It*. Cambridge: Cambridge University Press, 2007.

Articles/Journals

Betts, Alexander, 'Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants', pp. 209 – 236 in *International Journal of Refugee Law*, vol. 22 (2), 2010.

Regional Perspective: Exporting Deterrence and Negating Human Rights Standards',

pp. 69 – 83 in *University of Technology Sydney Law Review*, vol. 9, 2007.

Blay, Sam & Burn, Jennifer & Keyser, Patrick, 'Interception and Offshore Processing of Asylum Seekers: The International Law Dimensions', pp. 7 – 25 in *University of Technology Sydney Law Review*, vol. 9, 2007.

Bostock, Chantal, 'The International Legal Obligations owed to the Asylum Seekers on the MV Tampa', pp. 279 – 301 in *International Journal of Refugee Law*, vol. 14 (2 & 3), 2002.

Briggs, Vernon, 'US Asylum Policy and the New World Order', pp. 1 – 9 in *People and Place*, vol. 1 (3), 1993.

Cassese, Antonio, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', pp. 649 – 668 in *European Journal of International Law*, vol. 18 (4), 2007.

Chirwa, Danwood, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', in *Melbourne Journal of International Law*, vol. 5, 2004.

Crowley-Cyr, Lynda, 'Contractualism, Exclusion and 'Madness' in Australia's 'Outsourced Wastelands', pp. 81 – 102 in *Macquarie Law Journal*, vol. 5, 2005.

Dastyari, Azadeh, 'Swapping Refugees: The Implications of the 'Atlantic Solution', pp. 93 – 105 in *University of Technology Sydney Law Review*, vol. 9, 2007.

Domberger, Simon, & Jensen, Paul, 'Contracting Out By The Public Sector: Theory, Evidence, Prospects', pp. 67 – 78 in *Oxford Review of Economic Policy*, vol. 13 (4), 1997.

English, Linda, 'Public Private Partnerships in Australia: An Overview of Their Nature, Purpose, Incidence and Oversight', pp 250 – 262 in *University of New South Wales Law Journal*, vol. 29 (3), 2006.

Flinders, Matthew, 'The Politics of Public-Private Partnerships', pp. 215 – 239 in *British Journal of Politics and International Relations*, vol. 7 (2), 2006.

Francis, Angus, 'Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing', pp. 273 – 313 in *International Journal of Refugee Law*, vol. 20(2), 2008.

Gilmour, Robert, 'Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of State Action', pp. 247 – 258 in *Public Administration Review*, vol. 58 (3), 1998.

Ginn, Emma, 'Outsourcing Abuse: The Use and Misuse of State-Sanctioned Force During the Detention and Removal of Asylum Seekers', London: Medical Justice Network, 2008.

Goodwin-Gill, Guy, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', pp. 26 – 40 in *University of Technology Sydney Law Review*, vol. 9, 2007.

Guiraudon, Virginie, 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping', pp. 249 – 269 in *Journal of Common Market Studies*, vol. 38 (2), 2000.

Helton, Arthur, 'The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy implications and Prospects', pp. 325 –

350 in *New York Law School Journal*, vol. 10, 1993.

Hessbrügge, Jan, 'Human Rights Violations Arising from Conduct of Non-State Actors', pp. 21 - 88 in *Buffalo Human Rights Law Review*, vol. 11, 2005.

Hoppe, Carsten, 'Passing the Buck: State Responsibility for Private Military Companies', pp. 989 – 1014 in *European Journal of International Law*, vol. 19 (5), 2008.

Kamchibekova, Damira, 'State Responsibility for Extraterritorial Human Rights Violations', pp. 87 – 150 in *Buffalo Human Rights Law Review*, vol. 13, 2007.

Kneebone, Susan, 'The Pacific Plan: The Provision of 'Effective Protection'', pp. 696 – 721 in *International Journal of Refugee Law*, vol. 18 (3), 2006.

Koh, Harold, 'The “Haiti Paradigm” in United States Human Rights Policy', pp. 2391 – 2435 in *The Yale Law Journal*, vol. 8, 1994.

Lahav, Gallya, 'Immigration and the State: The Devolution and the Privatisation of Immigration Control in the EU', pp. 675 – 694 in *Journal of Ethnic and Migration Studies*, vol. 24 (4), 1998.

Larner Wendy, 'Neo-Liberalism: Policy, Ideology, Governmentality', pp. 5 – 25 in *Studies in Political Economy*, vol. 63, 2000.

Lemke, Thomas, 'A Zone of Indistinction – A Critique of Giorgio Agamben's concept of Biopolitics', pp. 3 – 13 in *Outlines, Critical Social Studies*, vol. 7 (1), 2005.

Legomsky, Stephen, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', pp. 567 – 677 in *International Journal of Refugee Law*, vol. 15 (4), 2003.

Maddison, Sarah, & Martin, Greg, 'Introduction to 'Surviving Neoliberalism: The Persistence of Australian Social Movements', pp. 101 – 120 in *Social Movements Studies*, vol. 9 (2), 2010.

Magner, Tara, 'The Less than 'Pacific' Solution for Asylum Seekers in Australia', pp. 53 – 90 in *International Journal of Refugee Law*, vol. 16 (1), 2004.

McBeth, Adam, 'Privatising Human Rights: What happens to the State's Human Rights duties when services are privatised?' pp. 133 – 154 in *Melbourne Journal of International Law*, vol. 5 (1), 2004.

McCorquodale, Robert & Simons, Penelope, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', pp. 598 - 625 in *The Modern Law Review*, vol. 70 (4), 2007.

McDonald, Douglas, ' Public Imprisonment by Private Means', pp. 29 – 48 in *British Journal of Criminology, Delinquency and Deviant Social Behaviour*, vol. 34, 1994.

Metzger, Gillian, 'Privatization as Delegation', pp. 1367 – 1502 in *Columbia Law Review*, vol. 103, No. 6, 2003.

Milanovic, Marko., 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', pp. 411 – 448 in *Human Rights Law Review*, vol. 8, 2008.

Noll, Gregor, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', pp. 303 – 341 in *European Journal of Migration and Law*, vol. 5, 2003.

Roxstrom, Erik & Gibney, Mark & Einarsen, Terje, 'The NATO Bombing case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection', pp. 56 – 136 in *Boston University International Law Journal*, vol. 23 (1), 2005.

Simma, & Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, & General Principles', pp. 82 – 108 in *Australian Year Book of International Law*, vol. 12, 1988.

Skogly, Sigrun & Gibney, Mark, 'Transnational Human Rights Obligations', pp. 781 – 798 in *Human Rights Quarterly*, vol. 24 (1), 2002.

Taylor, Savitri, 'The Pacific Solution or a Pacific Nightmare?: The Difference between Burden Sharing and Responsibility Sharing', pp. 1 – 43 in *Asian-Pacific Law & Policy Journal*, vol. 6, 2005.

Taylor, Savitri, 'Australia's Pacific Solution Mark II: The Lessons to be Learned', pp. 106 – 124 in *University of Technology Sydney Law Review*, vol. 9, 2007.

Taylor, Savitri & Rafferty-Brown, Brynna, 'Waiting for Life to Begin: the Plight of Asylum Seekers Caught by Australia's Indonesian Solution', pp. 538 – 592 in *International Journal of Refugee Law*, vol. 22 (4), 2010.

Tazreiter, Claudia, 'Local to Global Activism: The Movement to Protect the Rights of Refugees and Asylum Seekers', pp. 201 – 214 in *Social Movement Studies*, vol. 9 (2), 2010.

von Doussa, John, 'Human Rights and Offshore Processing', pp. 41 – 56 in *University of Technology Sydney Law Review*, vol. 9, 2007.

Wilde, Ralph, 'Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', pp. 739 – 806 in *Michigan Journal of*

International Law, vol. 26, 2005.

Institutional Sources

Amnesty International, *Australia – Pacific: Offending Human Dignity – The “Pacific Solution”*, AI Index: ASA 12/009/2002.

Australian Government, Department of Immigration and Citizenship, 'Refugee and Humanitarian Issues, Australia's Response, June 2011.

Australian Government, Department of Immigration and Citizenship, *Response to the AHRC's 2008 Immigration Detention Report*, Canberra, 2008.

Australian Government, Department of Immigration and Citizenship, *Response to the AHRC's 2011 Leonora Statement*, Canberra, 2011.

Australian Human Rights Commission, *Immigration Detention Report 2008*, AHCR, Canberra.

Australian Human Rights Commission, *Immigration Detention on Christmas Island*, AHCR, Canberra, 2010.

Australian Human Rights Commission, *Immigration Detention at Leonora*, AHCR, Canberra, 2011.

Australian National Audit Office (2004) *Management of the Detention Centre Contracts – Part A*. ANAO, Canberra.

Australian National Audit Office (2005) *Management of the Detention Centre Contracts – Part B*. ANAO, Canberra.

Australian National Audit Office (2006) *Management of the Tender Process for the Detention Services Contract*. ANAO, Canberra.

Australian National Audit Office (2007) *Preparations for the Re-tendering of DIAC's Detention and Health Services Contracts*. ANAO, Canberra.

Commonwealth Ombudsman (1997) *Final Report to the Department of Immigration and Ethnic Affairs of Investigation and Complaints Concerning Onshore Refugee Processing*. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (1997) *Revocation of Visas on Entry to Australia: Section 35A Report*. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2001) *Own Motion Investigation into Immigration Detainees Held in State Correctional Facilities*. Report 06/2001. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2001) *Own Motion Investigation into Immigration Detention Centres*. Report 05/2001. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2001) *Own Motion Investigation into the Department of Immigration and Multicultural Affairs Immigration Detention Centres*, Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2004) *Complaint about Delay in the Processing of an Application for a Bridging Visa*. Report 05/2004. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2005) *Complaint by Mr Z about his Immigration Detention*. Report 02/2005. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Administration of s 501 of the Migration Act 1958 as it Applies to Long-Term Residents*. Report 01/2006. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Report on Referred Immigration Cases: Mr T*. Report 04/2006. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Report on Referred Immigration Cases: Mr G*. Report 06/2006. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Report on Referred Immigration Cases: Mental Health and Incapacity*. Report 07/2006. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2006) *Department of Immigration and Multicultural Affairs: Report on Referred Immigration Cases: Children in Detention*. Report 08/2006. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2007) *Department of Immigration and Citizenship: Report into Referred Immigration Cases: Detention Process Issues*. Report 07/2007.

Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2007) *Department of Immigration and Citizenship: Report into Referred Immigration Cases: Data Problems*. Report 08/2007.

Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2007) *Department of Immigration and Citizenship: Report into Referred Immigration Cases: Notification Issues (including cases affected by the Federal Court Decision in Srey)*. Report 09/2007. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2007) *Department of Immigration and Citizenship: Report into Referred Immigration Cases: Other Legal Issues*. Report 10/2007.

Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2007) *Lessons for public administration: Ombudsman investigation of referred immigration cases*. Report 11/2007. Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman (2008) *Department of Immigration and Citizenship: Administration of Detention Debt and Write-Off*. Report 02/2008. Commonwealth Ombudsman, Canberra.

Human Rights and Equal Opportunity Commission (1998) *1998-99 Review of Immigration Detention Centres*. HREOC, Canberra.

Human Rights and Equal Opportunity Commission (1998) *Those Who've Come across the Seas: Detention of Unauthorised Arrivals*. HREOC, Canberra.

Human Rights and Equal Opportunity Commission (2000) *Immigration Detention*

Centre Guidelines. HREOC, Canberra.

Human Rights and Equal Opportunity Commission (2000) *Not the Hilton: Immigration Detention Centres: Inspection Report*. APH, Canberra.

Human Rights and Equal Opportunity Commission (2004) *A Last Resort? Report of the National Inquiry into Children in Immigration Detention*. HREOC, Canberra.

Human Rights and Equal Opportunity Commission (2006) *Inspection of Immigration Detention Centres*. HREOC, Canberra.

Human Rights and Equal Opportunity Commission (2007) *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities*. HREOC, Canberra.

Human Rights Watch, *'By Invitation Only: Australian Asylum Policy'*, Washington, vol. 14, No. 10(C), 2002.

Joint Standing Committee on Migration (1992), *Australia's Refugee and Humanitarian System: Achieving a Balance between Refugee and Control*. APH, Canberra.

Joint Standing Committee on Migration (1994) *Asylum, Border Control and Detention*. APH, Canberra.

Joint Standing Committee on Migration (1998) *Report of Inspections of Detention Centres throughout Australia*. APH, Canberra.

Joint Standing Committee on Migration (1998) *Deportation of Non-Citizens Criminals*. APH, Canberra.

Joint Standing Committee on Migration (2005) *Review of Audit Report No. 1 2005-2006: Management of Detention Centre Contracts – Part B*. APH, Canberra.

Joint Standing Committee on Migration (2005) *Report of the inspections of Baxter Immigration Detention Facility and Port Augusta Residential Housing Project, April 2005*. APH, Canberra.

Legal and Constitutional Affairs Legislation Committee, Estimates Hearing, *Transcript of evidence*, 24 May 2011.

Mick J Palmer (2005) *Inquiry into the Circumstances of the Immigration Detention in Cornelia Rau: Report*. DIMIA, Canberra.

National Contact Point Statement, *GSL Australia specific instance*, April 2006.

Nigel Comrie (2005) *Inquiry into the Circumstances of the Vivian Alvarez Matter*. Commonwealth Ombudsman, Canberra.

Senate Committee on Legal and Constitutional Affairs (2005) *Provisions of the Migration Litigation Reform Bill 2005*. APH, Canberra.

Senate Legal and Constitutional Legislation Committee (1997) *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (No. 4) 1997*. APH, Canberra.

Senate Legal and Constitutional Legislation Committee (1997) *Migration Legislation Amendment Bill (No. 5) 1997*. APH, Canberra.

Senate Legal and Constitutional References Committee (2000) *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination*

Processes. APH, Canberra.

Senate Legal and Constitutional References Committee (2002) *Migration Zone Excision: An Examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and Related Matters*. APH, Canberra.

Senate Legislation Committee on Legal and Constitutional Affairs (2006) *Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006*. APH, Canberra.

Senate Stranding Committee on Legal and Constitutional Affairs (2006) *Migration Amendment (Review Provisions) Bill 2006*. APH, Canberra.

Senate Stranding Committee on Legal and Constitutional Affairs (2006) *Migration Amendment (Visa Integrity) Bill 2006*. APH, Canberra.

Senate References Committee on Legal and Constitutional Affairs (2006) *Administration and Operation of the Migration Act 1958*. APH, Canberra.

Jurisprudence and Advisory Opinions

Permanent Court of International Justice

Case of the S.S Lotus, PCIJ Series A – No. 10 1927

International Court of Justice

Corfu Channel Case, Judgment of April 9th, I.C.J Reports 1949

United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J Reports 1980

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of

America), Merits, I.C.J Reports 1986

Hyatt International Corporation v Government of the Islamic Republic of Iran (1985) 9 Iran-US CTR 72.

International Criminal Tribunal for the Former Yugoslavia

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

Case IT-94-1, Prosecutor v Tadić, (1999) I.L.M

United Nations Human Rights Committee ICCPR

A v Australia, Communication No. 560/1993

Badam et al v Australia, No 1014/2001

Bakhtiyari v Australia, No 1069/2002

B.d.B v the Netherlands, Communication No. 273/1988

C v Australia, Communication No. 900/1999

Cabal and Pasini v Australia Communication No. 1020/2001

Domukovsky et al v Georgia, Communication No. 623/1995

Edwards v Jamaica, Communication No. 529/1993

Mukong v Cameroon, Communication No 458/1991

Smith & Stewart v Jamaica, CommunicationNo 668/1995

van Alphen v the Netherlands, Communication No. 305/1988

Reports of International Arbitral Awards

D. Earnshaw and Others (Great Britain) v. United States (Zafiro case), 1925, vol. VI, p. 160.

Dame Mossé, 1953, No. 144 & 157, p. 486

Lehigh Valley Railroad Company, and others (USA) v Germany: Black Tom, 1939, vol. VIII, p. 84

Stephens, 1927, vol IV, p. 265

UNHCR Executive Committee Decisions and Conclusions

Executive Committee Conclusion No 6 (XXVIII) - 1977

Executive Committee Conclusion No 15 (XXX) – 1979

Executive Committee Conclusion No 58 (XL) – 1989

Executive Committee Conclusion No 44 (XL) – 1986

Executive Committee Conclusion No 85 – 1988

Legislation

Australia

Financial Management and Accountability Act 1997

Financial Management and Accountability Regulations 1997

Migration Act 1958

United States

Haitian Migration Interdiction Program, Proclamation No. 4865

Presentations/Papers

Afeef, Karin, 'The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific', Refugee Studies Centre, RSC Working Paper No. 36. Oxford: Oxford University, 2006.

Bacon, Christine, 'The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies', Refugee Studies Centre, RSC Working Paper No. 27.

Oxford: Oxford University, 2005.

Gammeltoft-Hansen, Thomas, 'The Extraterritorialisation of Asylum and the Advent of 'Protection Lite'. Working Paper 2/2007. Copenhagen: Danish Institute for International Studies, 2007.

Gammeltoft-Hansen, Thomas, 'Outsourcing Migration Management: EU, power, and the external dimension of asylum and immigration policy. DIIS Working Paper no 2006/1. Copenhagen: Danish Institute for International Studies, 2006.

Garnier, Adele, 'Are States in Control of their Borders? Testing the venue – shopping approach in the Australian context', Working Paper Series of the Graduate Centre Humanities and Social Sciences of the Research Academy Leipzig, No. 6, Leipzig, 2010.

Goodwin-Gill, Guy, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection'. Paper prepared at the request of the Department of International Protection for the UNHCR, Global Consultations, Oxford, 2001.

Menz, Georg, 'Outsourcing, Privatization and the Politics of Privatizing Migration'. Paper prepared for presentation at the International Studies Association Conference in Montreal, 2011.

Memoranda of Understanding

Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues, 2002.

Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues, 2002.

Legal Instruments

Economic and Social Council, Resolution 663 C (XXIV), *Standard Minimum Rules for the Treatment of Prisoners*. 31 July 1957.

General Assembly of the United Nations, Resolution 217 A (III), *Universal Declaration of Human Rights*. 10 December 1948.

General Assembly of the United Nations, Resolution 429 (V), *Convention relating to the Status of Refugees*. 14 December 1950.

General Assembly of the United Nations, Resolution 2106 (XX), *International Convention on the Elimination of All Forms of Racial Discrimination*. 21 December 1965.

General Assembly of the United Nations, Resolution 2200A (XXI), *International Covenant on Civil and Political Rights*. 16 December 1966.

General Assembly of the United Nations, Resolution 2200A (XXI), *International Covenant on Economic, Social and Cultural Rights*. 16 December 1966.

General Assembly of the United Nations, Resolution 2198 (XXI), *Protocol relating to the Status of Refugees*, 16 December 1966.

General Assembly of the United Nations, Resolution 2447 (XXX), *Declaration on the Rights of Disabled Persons*. 9 December 1975.

General Assembly of the United Nations, Resolution 34/180, *Convention on the Elimination of All Forms of Discrimination against Women*. 1979.

General Assembly, Resolution 36/55, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*. 25 November 1981.

General Assembly of the United Nations, Resolution 39/46, *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*. 10 December 1984.

United Nations High Commissioner for Refugees, Executive Committee, *Conclusion No. 44 (XXXVII)- Detention of Refugees and Asylum Seekers* (13 October 1986)

General Assembly, Resolution 43/173, *Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment*. 9 December 1988.

General Assembly of the United Nations, Resolution 44/25, *Convention on the Rights of the Child*, 20 November 1989.

General Assembly, Resolution 45/113, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*. 14 December 1990.

General Assembly of the United Nations, Resolution A/CN.4/SR.2675, *The Articles on Responsibility of States for Internationally Wrongful Acts*. 11 May 2001.

General Assembly of the United Nations, Resolution A/RES/57/199, *Optional Protocol on the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment*. 18 December 2002.

Office of the United Nations High Commissioner for Refugees, *UNHCR Revised*

Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. 26 February 1999.

UN Documents

UN Doc. E/AC.32.L.38

UN Doc. A/CONF.2.SR.13

UN Doc. A/CONF.2.SR.14

UN Doc. A/AC.96/601

UN Doc. E/AC.32/SR.40

UN Doc. E/AC.32/L.22

UN Doc. E/CN.4/21

UN Doc. E/CN.4/SR.95

UN Doc. A/C.3/L686

UN Doc. A/C.3/SR.866

UN Doc. A/C.3/SR.863

UN Bodies

United Nations High Commissioner for Human Rights

Report of Justice P.N.Bhagwati, Regional Adviser for Asia and the Pacific, *Human Rights and Immigration Detention in Australia*, 2002.

Working Group on Arbitrary Detention

Report of the Working Group on Arbitrary Detention, 2002.

Internet pages

(all webpages were consulted on 25 June 2011)

Amnesty International	www.amnesty.org
Australian Broadcasting Corporation	www.abc.net.au
Australian Human Rights Commission	www.hreoc.gov.au
Australian National Audit Office	www.anao.gov.au
Australian Parliament, Senate	www.aph.gov.au/senate/
Crikey News	www.crikey.com.au
Global Detention Project	
	www.globaldetentionproject.org
G4S	www.g4s.com
Human Rights Watch	www.hrw.org
International Commission of Jurists	www.icj.org
Oxfam International	www.oxfam.org
Department of Immigration and Citizenship	www.immi.gov.au
Northern Territory News	www.ntnews.com.au
Refugee Council Australia	www.refugeecouncil.org.au
Serco	www.serco.com
Sydney Morning Herald	www.smh.com.au
The Age	www.theage.com.au
The Australian	www.theaustralian.com.au
United Nations	www.un.org

