

AUSTRALIAN FUNDED CARE AND MAINTENANCE OF ASYLUM SEEKERS IN INDONESIA AND PAPUA NEW GUINEA: ALL CARE BUT NO RESPONSIBILITY?

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I INTRODUCTION

Australia's preferred role in global efforts to deal with asylum seekers is to be a country of resettlement. Although Australia is a party to the *Convention Relating to the Status of Refugees*¹ and the *Protocol Relating to the Status of Refugees*,² it is less than enthusiastic about the need to give effect to its obligations under those treaties in relation to individuals who arrive in Australia without prior authorisation. Accordingly, Australia has put in place a number of offshore border controls to minimise the number of onshore asylum seekers with whom it has to deal. Among these are arrangements with regional countries pursuant to which the authorities of those countries intercept third country nationals³ within their territory who appear intent on travelling to Australia without permission. The arrangements presently in place in Indonesia and Papua New Guinea ('PNG') provide not only for interception but also for the care of those intercepted. The question explored in this paper is whether Australia bears any legal responsibility for respecting, protecting and/or fulfilling the human rights of intercepted asylum seekers who are caught by those arrangements.

The most obvious sources of international human rights obligations towards asylum seekers are the *Refugee Convention* and *Refugee Protocol*. However, the

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1 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*').

2 *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*').

3 The term is being used in this context to refer to individuals who are nationals of neither Australia nor the intercepting state.

only *Refugee Convention* provisions that are *not* territorially limited, and therefore even arguably binding on Australia within the territory of Indonesia and PNG, are articles 3 (non-discrimination), 13 (moveable and immovable property), 16(1) (access to courts), 20 (rationing), 22 (education), 29 (fiscal charges), 33 (*non-refoulement*), and 34 (naturalisation).⁴ On the other hand, article 5 of the *Refugee Convention* provides:

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Apart from the *Refugee Convention* and *Refugee Protocol*, the other obvious sources of human rights obligations are, of course, the international human rights treaties.

Australia is a party to all of the core human rights treaties except the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.⁵ However, considerations of space preclude the possibility of considering obligations under all of these treaties. The rest of this paper is therefore limited to a consideration of Australia's obligations under the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') towards asylum seekers caught by the arrangements Australia has in place in Indonesia and PNG.⁶ The reason for the focus on ICESCR is that it deals with most of the rights most affected by the arrangements examined in this paper.

II THE REGIONAL COOPERATION ARRANGEMENTS

A Indonesia

Since approximately early 2000, Australia has had an arrangement in place with the Indonesian government and the International Organisation for Migration ('IOM'), which Australia refers to as a Regional Cooperation Arrangement ('RCA'). Under the RCA, Indonesian authorities intercept irregular migrants and refer those they determine to have been headed toward Australia or New Zealand to the IOM for 'case management and care'.⁷ IOM refers those who indicate they wish to make asylum claims to the United Nations High Commissioner for Refugees ('UNHCR'), which determines such claims pursuant to its own international mandate.⁸ IOM continues to provide individuals with material assistance pending the determination of their asylum claims and the finding of a

4 James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 160 fn 24.

5 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

6 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1996, 993 UNTS 3 (entered into force 3 January 1976).

7 IOM Indonesia, *Fact Sheet/Irregular Migration/2010/1* (2010) <[http://www.iom.or.id/project/eng/fs/Irregular%20Migration%20Fact%20Sheet_2010_eng\(lo\).pdf](http://www.iom.or.id/project/eng/fs/Irregular%20Migration%20Fact%20Sheet_2010_eng(lo).pdf)>.

8 *Ibid.*

durable solution.⁹ IOM also provides repatriation assistance to individuals who wish to return home at any stage.¹⁰ IOM's RCA activities are funded by Australia.¹¹

In 2007, IOM commenced a project titled 'Management and Care of Irregular Migrants Project' ('MCIIP') that is related to the RCA and, like the RCA, fully Australian funded. The MCIIP project has three components. The first was renovating and refurbishing Indonesia's two largest immigration detention centres, located in central Jakarta and Tanjung Pinang,¹² to bring them up to 'international standards'.¹³ The capacity of the centre in Tanjung Pinang was also expanded.¹⁴ IOM's former Chief of Mission in Indonesia has been quoted as saying that the Tanjung Pinang immigration detention centre is 'for people who are transiting in Indonesia for Australia'.¹⁵ The second component of the MCIIP project was the collaborative development by Indonesia's Directorate-General of Immigration ('Imigrasi') and IOM of 'a standard operating procedural ('SOPs') manual for use in all detention houses, detention rooms and border checkpoints'.¹⁶ The third component of the MCIIP project is providing 'training and resourcing for a dedicated unit to facilitate the voluntary return of persons not in need of protection'.¹⁷

Until relatively recently Indonesia allowed most asylum seekers who fell within the scope of the RCA to live in Australian funded IOM provided accommodation with a reasonable degree of freedom of movement.¹⁸ In the case of women and children, non-detention was a proactive policy choice. The Indonesian government's preferred practice was to allow at least the mother and child(ren) to live in IOM accommodation,¹⁹ even if the father of the same family

9 UNHCR, *Senate Legal and Constitutional References Committee Inquiry into the Administration and Operation of the Migration Act 1958: Response of United Nations High Commissioner for Refugees to Questions Taken on Notice* (26 October 2005) [2.1] <http://www.aph.gov.au/senate/committee/legcon/committee/legcon_ctte/migration/qon/26oct-unhcr.pdf>.

10 IOM Indonesia (2010), above n 7.

11 Ibid.

12 Tanjung Pinang is a town on Bintan Island in the Riau Islands province.

13 IOM Indonesia, *Annual Report* (2008) 88–9.

14 The number able to be accommodated at the facility at Tanjung Pinang was increased from 100 people to 400 people with a surge capacity of 600 people: Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 19 February 2008, 137 (Robert Illingworth).

15 Steve Cook quoted in Steve Pennells, 'Canberra's \$8m Indon Jail Gift Hushed up', *The West Australian* (Perth), 16 August 2008, 3.

16 IOM Indonesia (2008), above n 13, 89.

17 Australian Government, *Budget 2007–08, Budget Paper No 2, Part 2: Expense Measures, Immigration and Citizenship* (2007) <<http://www.budget.gov.au/2007-08/bp2/html/expense-25.htm>>.

18 Individuals living in IOM accommodation are subject to a night curfew. In addition, their whereabouts is subject to monitoring by Indonesian authorities: UNHCR, above n 9, [2.1]; *UNHCR Awasi Pengungsi WNA di NTB (UNHCR Oversees Asylum Seekers in West Nusa Tenggara)* (1 August 2008) Kapanlagi <<http://www.kapanlagi.com/h/0000242351.html>>. They must also get police permission to travel from their area of residence: Elizabeth Biok, 'The Regional Perspective: Exporting Deterrence and Negating Human Rights Standards' (2007) 9 *UTS Law Review* 69, 81.

19 Interview with Husni Tamrin, Head of Immigration Detention, Directorate-General of Immigration (Indonesia, 4 June 2009).

was placed in an immigration detention centre.²⁰ In other cases, however, the use of alternatives to detention was a practical necessity flowing from a lack of room in detention facilities. Unfortunately, the Australian funded increase in Indonesian immigration detention capacity has been matched by an increased tendency on the part of the Indonesian government to detain asylum seekers.²¹

IOM, using Australian government funding, provides all food, non-food necessities and health care for asylum seekers caught by the RCA, whether they are held in immigration detention centres or are allowed to live in IOM accommodation.²² Imigrasi does not have a budget allocation for the care of such individuals, though it does have one for the care of detained migrants other than asylum seekers.²³ As at 31 March 2010, IOM was caring for 1335 individuals across Indonesia pursuant to the RCA.²⁴ Of these individuals, 570 were in detention.²⁵

B Papua New Guinea

In December 2005, Australia entered a Memorandum of Understanding ('MOU') with PNG and IOM on the Care, Protection, and Voluntary Return of Certain Irregular Migrants from PNG. The MOU sets out an arrangement under which 'PNG, Australia and IOM will cooperate in the areas of identification and processing of irregular immigrants transiting PNG who might attempt to enter Australia unlawfully'.²⁶ If Australia bound individuals are intercepted 'and there is no way of funding their subsistence until their cases are looked into',²⁷ the MOU provides that Australia will fund IOM to meet those subsistence needs, including accommodation and basic health care.²⁸ The MOU further provides that PNG will consider any claims for refugee status made by such individuals,²⁹ with IOM (funded by Australia) continuing to meet their subsistence needs

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- 20 Tom Allard, 'A Desperate Family's 10-Year Struggle for a Home', *The Age* (online), 23 May 2009, <<http://www.theage.com.au/national/a-desperate-family-s-10-year-struggle-for-a-home-20090522-bicu.html>>; Interview with Pamela Curr (Melbourne, 7 August 2008); Interview with asylum seeker/refugee A038 (Indonesia, 7 August 2009). In some cases, families (including extended families) choose to be together in an immigration detention centre rather than be separated through implementation of other arrangements: Interview with Ohan Suryana, Head of Tanjung Pinang Immigration Office (Indonesia, 16 July 2009).
- 21 IOM, 'IOM's Experience with Immigration Detention and Alternatives to Detention' (Paper presented at the Sub-Regional Roundtable on Alternatives to Detention of Asylum Seekers, Seoul, 26–27 April 2010) 7.
- 22 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 February 2010, 149–50 (Robert McClelland).
- 23 Interview with Riau Islands Imigrasi official 1 (Indonesia, 30 June 2009).
- 24 IOM, above n 21, 7; IOM Indonesia (2010), above n 7.
- 25 IOM, above n 21, 7.
- 26 Amanda Vanstone, 'Strong Teamwork Key to Migration Management' (Media Release, 16 December 2005) <http://pandora.nla.gov.au/pan/31543/20060430-0000/www.minister.immi.gov.au/media_releases/media05/v05157.html>.
- 27 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 13 February 2006, 62 (Peter Hughes, Department of Immigration).
- 28 Vanstone, above n 26.
- 29 *Ibid.*

through that process.³⁰ In selected cases, Australia will also pay the subsistence costs of individuals found to be refugees while they are awaiting resettlement to a third country.³¹ Where intercepted individuals wish to return to their home country but do not have the funds to do so and the PNG government does not have the funds to assist them either, Australia will fund IOM to arrange for their return³² and care for them pending return.³³ At the time of writing, operationalisation of the 2005 MOU was in its very early stages.

On 20 June 2007, Australia and IOM signed a project funding agreement that covers (among other things) the care of irregular migrants under the 2005 MOU.³⁴ The provision of the project funding enabled IOM to open an office in Port Moresby in mid-August 2007.³⁵ The project funding is also supporting an Assisted Voluntary Return Program ('AVRP'), pursuant to which irregular migrants identified and intercepted by the PNG government are referred to IOM for temporary care, counselling, accommodation and travel arrangements for voluntary repatriation.³⁶ The AVRP goes part way towards operationalising the arrangement envisaged by the 2005 MOU. As at September 2009, it was being piloted in Port Moresby with a focus on irregular migrants intercepted at the international airport, and the expectation was that it would be expanded beyond Port Moresby in the near future.³⁷

C Other Countries

In May 2002, a Department of Immigration and Citizenship ('DIAC') official informed an Australian Senate Committee that there were arrangements similar to the Indonesian arrangement in place in Cambodia, pursuant to which IOM had been paid \$556 680 to care for about 240 individuals.³⁸ In December 2002, the Minister for Immigration, Philip Ruddock, provided Parliament with further details saying that, pursuant to the arrangement, 248 people en route to Australia had been intercepted by Cambodian authorities and looked after by

30 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 13 February 2006, 62 (Peter Hughes, Department of Immigration).

31 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 13 February 2006, (Andrew Metcalfe, Department of Immigration).

32 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 13 February 2006, 62 (Peter Hughes, Department of Immigration).

33 Evidence to Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 22 May 2006, 148 (Peter Hughes, Department of Immigration).

34 Interview with anonymous source 'A' (Telephone Interview, 23 November 2007). The currently specified end date of the project is 2010.

35 Ibid; Department of Immigration and Citizenship, *Annual Report 2007–08* (2008) 76–7.

36 Email from Solomon Kantha (National Programme Officer, IOM Port Moresby) to the author, 17 September 2009; IOM, *Papua New Guinea* <<http://www.iom.int/jahia/Jahia/pid/1464>>.

37 Email from Solomon Kantha (National Programme Officer, IOM Port Moresby) to the author, 17 September 2009.

38 Evidence to Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 29 May 2002, 460 (John Okely, Department of Immigration).

IOM while their cases had been investigated.³⁹ In late 2003, mention was made by DIAC and the Minister for Immigration of Australia having a similar but ‘even more informal’ arrangement with East Timor, which also relied on the cooperation of IOM.⁴⁰ No further references have since been made to the arrangement with Cambodia. However, DIAC recently confirmed that in 2009–10 it funded IOM ‘to provide care and maintenance for intercepted irregular migrants in Indonesia, Papua New Guinea and East Timor’.⁴¹ Furthermore, DIAC’s budget for 2010–11 and forward includes an item entitled ‘regional cooperation and capacity building’ with, inter alia, the following objectives:

To assist the facilitation of bona fide people movements while preventing and deterring irregular movements, including people smuggling and trafficking, in our region and in source/transit countries.

To support international organizations for the care of irregular migrants intercepted en route to Australia.⁴²

Since there is a separate budget item for ‘management and care of irregular immigrants in Indonesia’,⁴³ it can be inferred that the more broadly specified item is a catch-all for PNG, East Timor, and any other countries with which it may become expedient to establish such arrangements in the future. In short, though the rest of this paper is limited to an examination of Australia’s arrangements with Indonesia and PNG, the questions and answers generated by this analysis are likely to have significance beyond those particular cases.

III STATE RESPONSIBILITY

In the context of holding a state responsible for violating human rights, Rolf Künneemann has made the following important point:

Human rights are the rights (of vulnerable individuals or communities) that recognise certain basic human standards and impose certain obligations on States and the community of States. Upon recognition as a human right, the related basic human standard can be called its ‘human rights standard’...

The human rights standard is a certain quality of life manifest in certain situations (for example, access to food, political participation and so forth) to which people normally aspire. When this standard is not enjoyed, the result is seen as a form of deprivation ...

39 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2002, 9466 (Philip Ruddock, Minister for Immigration).

40 Commonwealth, *Parliamentary Debates*, Senate, 4 December 2003, 18627 (Amanda Vanstone, Minister for Immigration and Indigenous Multicultural Affairs).

41 Department of Immigration, *Answer to Question 20 Taken on Notice: Additional Budget Estimates Hearing* (9 February 2010) <http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_0910/diac/20_qon.pdf>.

42 Australian Government, *Portfolio Budget Statements 2010–11, Budget Related Paper No 1.13 Immigration and Citizenship Portfolio* (2010), 56, 59 <<http://www.immi.gov.au/about/reports/budget/budget10/pbs/2010-11-pbs-full.pdf>>.

43 Ibid.

Every case of malnutrition is a deprivation of the human rights standard to be free from hunger. Does it also indicate a violation of this human right? Violations of human rights are acts or omissions by States, using the term 'violation' in the strict classical sense. Violations are breaches of States' obligations.⁴⁴

While there is considerable evidence that individuals subject to the RCA do not enjoy the human rights standard in relation to several of the rights set out in *ICESCR*,⁴⁵ it does not follow from that fact alone that the rights concerned have been violated by any state. A state is only regarded as having committed an internationally wrongful act if conduct attributable to it has resulted in the breach of one of its international obligations. It is always necessary, therefore, to analyse the particular circumstances in order to ascertain whether the deprivation of a human rights standard resulted from an act or omission of the state in question that amounted to a breach of obligations owed by that state to that person.

Conversely though, there is no valid reason for positing that if state A is responsible for violating a given right of a given person, then state B cannot also be responsible for violating that right unless the two states acted in concert. It is now generally accepted that there are three obligations correlative to every substantive human right: the obligation to respect, the obligation to protect, and the obligation to fulfil. If this proposition is accepted, it follows logically that a given right of a given person can be violated simultaneously by more than one state without it necessarily being the case that they acted in concert. For example, state A may have taken an action that violated the duty to respect that right, but state B may have had a duty to protect that it violated by failing to take action to prevent the violation by state A. Both states are guilty of violating the right, albeit in different ways.

In the present context, close analysis of a particular human rights deprivation suffered by an individual subject to one of the RCAs discussed in this paper may establish that no state bears responsibility for violating the relevant human right or that one or more states bear responsibility for it. Indonesia and PNG are also parties to *ICESCR*. The fact that this paper only discusses Australia's responsibility should not be taken as implying that Indonesia or PNG would have no relevant responsibilities under international law.

A What Conduct Is Attributable to Australia?

It is well established in international law that the conduct of an official of a state, who appears to be acting in their official capacity, is attributable to that state, even if, in terms of the state's domestic law, they are actually acting outside

44 Rolf Künemann, 'The Right to Adequate Food: Violations Related to Its Minimum Core Content' in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002) 161, 164.

45 See Jessie Taylor, *Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia* (3 November 2009) <<http://www.law.monash.edu.au/castancentre/news/behind-australian-doors-report.pdf>>. As yet unpublished fieldwork conducted by the author and colleagues identifies similar human rights concerns in relation to asylum seekers in Indonesia. It is too early to make any comment about the operation in practice of arrangements under the 2005 Australia-PNG-IOM MOU.

their competence.⁴⁶ It is irrelevant for the purposes of attribution whether an official's conduct takes place within or outside the territory of the state on whose behalf they are or appear to be acting.⁴⁷ In the context of the RCAs, the acts or omissions of Australia's DIAC and other officials in establishing and maintaining them are attributable to Australia. What though of the conduct of IOM?

IOM is an inter-governmental organisation with a membership of 127 states.⁴⁸ Its purposes and functions include providing 'at the request of and in agreement with the States concerned, migration services ... and other assistance as is in accord with the aims of the Organization'.⁴⁹ As a DIAC official has put it, IOM's 'services can be purchased by any government for use by that government or on behalf of other governments.'⁵⁰ DIAC has a 'contract with IOM' for 'each one' of the services it has purchased from that organisation in Indonesia.⁵¹ In response to questions about Australian oversight of these arrangements, DIAC has explained that it holds 'ongoing meetings' with IOM representatives to discuss the progress of projects, and that its funding agreement includes 'requirements for regular formal and informal reporting on project delivery and funding expenditure, and the achievement of milestones that are linked to the payment of agreed instalments'.⁵² In order to receive its payments for care and maintenance, IOM has to provide monthly statistics of the people in its care to DIAC together with invoices, which are checked.⁵³ According to DIAC, it often does field and site visits as well.⁵⁴ Presumably, the PNG RCA involves analogous arrangements.

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- 46 International Law Commission ('ILC'), Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 arts 4 and 7 ('Draft Articles'). These draft articles are accepted as codifying the customary international law principles of state responsibility.
- 47 Andrew Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2003) 21(4) *Refuge: Canada's Periodical on Refugees* 6, 13–14.
- 48 IOM, *Member States* (June 2009) <<http://www.iom.int/jahia/Jahia/member-states>>.
- 49 IOM, *Constitution* art 1 <<http://www.iom.int/jahia/Jahia/about-iom/constitution/lang/en>>.
- 50 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 9 February 2010, 86 (Peter Hughes, Department of Immigration).
- 51 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 9 February 2010, 87 (Arja Keski-Nummi, Department of Immigration). The Australian government refuses to release the contracts publicly on the basis that they are commercial-in-confidence: Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 26 May 2010, 92 (Chris Evans, Minister for Immigration).
- 52 Department of Immigration, *Answer to Question 84 Taken on Notice at Supplementary Budget Estimates Hearing* (20 October 2009) <http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/sup_0910/diac/84_qon.pdf>.
- 53 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 20 October 2009, 172 (Arja Keski-Nummi, Department of Immigration); Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 9 February 2010, 87 (Arja Keski-Nummi, Department of Immigration).
- 54 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 20 October 2009, 172 (Arja Keski-Nummi, Department of Immigration).

The conduct of non-state actors is not normally attributable to a state under international law.⁵⁵ However, there are certain circumstances in which the general rule does not apply and attribution is possible. According to article 5 of the ILC Draft Articles:

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 (emphasis added).⁵⁶

The principle in article 5 developed as a safeguard against states avoiding international responsibility for the consequences of governmental activity by simply ‘farming out’ the conduct of those activities to the private sector or for that matter an international organisation.

The functions fulfilled by the RCAs are border control, refugee status/asylum claim determination, and asylum seeker/refugee care and protection, which can all be described as governmental functions.⁵⁷ In Australia’s case, the point of the RCAs is to ensure that these functions are carried out extra-territorially, but this does not detract from their governmental character. The more difficult question to answer is whether the arrangements are such that a non-state actor is being ‘empowered by the law’ of Australia to carry out the governmental functions in question. The empowered by law requirement could be interpreted narrowly to mean that there must be domestic legislation in place directly empowering the non-state actor in question to carry out the functions. If this is correct, IOM’s conduct could not be attributed to Australia under the principle articulated in draft article 5. It would appear, however, that the correct interpretation of the requirement is a broader one, encompassing a situation in which a governmental agency, empowered by legislation to discharge a particular function, lawfully delegates the function whether by contract or otherwise.⁵⁸ The broader interpretation almost certainly represents the ILC’s intention given that it specifies as an example of the application of article 5 the attribution to the state of the conduct of private security firms that have been ‘*contracted to act as prison guards*’.⁵⁹ Since IOM has been lawfully contracted and funded by DIAC

55 The term ‘non-state actor’ is being used loosely since international organisations are more accurately described as ‘multi-state actors’ than ‘non-state actors’: Smita Narula, ‘The Right to Food: Holding Global Actors Accountable under International Law’ (2006) 44 *Columbia Journal of Transnational Law* 691, 738.

56 Draft articles art 5 (emphasis added).

57 Immigration control is in fact one of the examples of governmental functions mentioned by the ILC: ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001* (2008) 43 <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. See further, Oliver R Jones, ‘Implausible Deniability: State Responsibility for the Actions of Private Military Firms’ (2009) 24 *Connecticut Journal of International Law* 239, 265–6.

58 *Ibid.*, 267–8 citing University Centre for International Humanitarian Law, *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions* (2005) <http://www.adh-geneve.ch/pdfs/2rapport_compagnies_privees.pdf>.

59 Jones, above n 57, 265 (emphasis added).

to carry out governmental functions pursuant to the RCAs, its conduct is most likely attributable to Australia under article 5.

If it should be the case, however, that IOM's conduct cannot be attributed to Australia under article 5, it may still be the case that attribution is possible under the principle articulated in article 8 of the ILC Draft Articles. Unlike article 5, article 8 does not draw a distinction between governmental and non-governmental functions. What matters for the purposes of article 8 is not the nature of the activity but the nature of the state's involvement therein. According to article 8, '[t]he 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'.

The ILC commentary on article 8 suggests it is intended to embody the test of attribution articulated in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)*.⁶⁰ In the *Nicaragua Case*, the International Court of Justice ('ICJ') had to consider whether certain actions of the Contras in Nicaragua could be attributed to the US. The Court held that:

United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying, and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.⁶¹

Attribution was only possible if the specific paramilitary operation in which the impugned act was committed was carried out under the 'effective control' of the US, *or* the impugned act was carried out pursuant to a specific instruction of the US.⁶²

IOM as an organisation is not under Australia's effective control. IOM is governed by its Constitution and by its Council on which Australia, like every other member state, has one representative and one vote.⁶³ IOM's offices in Indonesia and PNG are part of the IOM administrative hierarchy and their operations are under the control, ultimately, of the IOM Director General. Of course, the governments of Indonesia and PNG are, by dint of their control over their respective territories, in a position to exercise effective control over IOM operations in their territory if they should so choose, but the Australian

60 [1986] ICJ Rep 14 ('*Nicaragua Case*').

61 Ibid [115].

62 Jan Arno Hessbrügge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36(2/3) *New York University Journal of International Law and Politics* 265, 272–3. The International Court of Justice in its 26 February 2007 judgment in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ 2) reiterated and endorsed the stringent test of control articulated in the *Nicaragua Case*, even though a softening of the test had been discernible in the previous jurisprudence of other international tribunals.

63 IOM, *Constitution* <<http://www.iom.int/jahia/Jahia/about-iom/constitution/lang/en>>.

government is not in a like position. The Australian government has mechanisms in place for monitoring contract performance and holding IOM accountable for breach of contract, but that is not at all the same thing as exercising effective control over IOM's day to day activities.

For the purposes of attribution under article 8, the alternative to showing that a non-state actor is acting under the 'control' of a state is showing that it is 'acting on the instructions of' the state'. The contracts that Australia has with IOM for provision of RCA services contain terms setting out what IOM must do in order to receive payment from Australia. Those terms are, in effect, instructions by Australia to its contractor, IOM, and IOM's performance of the terms would therefore fit the description of 'acting on the instructions of' Australia.

There is however a potential obstacle to attributing any particular act or omission of IOM to Australia on the basis of this limb of article 8. According to the ILC: '[i]n general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way'.⁶⁴ On the other hand, the 'excess of authority' escape clause in relation to acting on instructions seems out of keeping with the underlying rationale of the attribution principles and not everyone agrees that the escape clause exists.⁶⁵ It can at least be argued that 'where a contract does not specify the manner in which an act is to be performed, it may be interpreted as sanctioning any means of performance which the contractor sees fit'.⁶⁶

B Is the Conduct in Breach of Australia's ICESCR Obligations?

ICESCR article 2(1) provides:

Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

While the undertaking 'to take steps ... with a view to achieving' in this provision seems weak by comparison with the undertaking in *International Covenant on Civil and Political Rights*⁶⁷ article 2(1) 'to respect and to ensure', the obligations imposed on states are stronger than may at first be apparent.

64 ILC, above n 57, 48.

65 See, eg, Rudiger Wolfrum, 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, 2005) 423, 431–2.

66 Jones, above n 57, 271 citing University Centre for International Humanitarian Law, *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions* (2005) <http://www.adh-geneve.ch/pdfs/2rapport_compagnies_privees.pdf>.

67 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

There is an immediately applicable obligation of conduct.⁶⁸ ‘steps must be taken’ and they must be taken continuously, expeditiously, and effectively toward the full realisation of *ICESCR* rights utilising the maximum of available resources.⁶⁹ Even a developed country such as Australia may be able successfully to plead resource constraints as a reason for failing, at a given point in time, to realise *fully* the rights contained in the *ICESCR*.⁷⁰ However, such a plea will not avail in the absence of proof.

The undertaking in *ICESCR* article 2(1) is not explicitly qualified by reference to either territory or jurisdiction. Any contention that a territorial⁷¹ qualification is implicit in the provision is surely rebutted by the fact that some transnational dimension to *ICESCR* obligations seems contemplated in the undertaking by state parties ‘to take steps ... through international assistance and co-operation’ to achieve the full realisation of *ICESCR* rights.⁷² Moreover, as Rolf Künemann notes,⁷³ there is no textual indication that the obligation ‘to take steps individually’ is only binding territorially or that the obligation ‘to take steps ... through international assistance and cooperation’⁷⁴ is only binding extraterritorially. In other words, there is nothing in article 2(1) *ICESCR* to indicate anything other than that state parties are undertaking to take steps individually *and* through international cooperation both within *and* outside their territory to achieve full realisation of *ICESCR* rights.

1 Individual Steps

There is, of course, no problem with requiring states to respect human rights everywhere in the world, because all that is required here is the *not doing* of

68 Philip Alston and Gerard Quinn, ‘The Nature and Scope of State Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156, 165–6.

69 For guidelines as to the ‘maximum resources available’ see the Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ under an Optional Protocol to the Covenant: Statement*, 38th sess, UN Doc E/C.12/2007/1 (10 May 2007); see also M Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 319–20 citing Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties’ Obligations* (1990) [9].

70 Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Clarendon Press, 1995) 132–3.

71 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 29, which is reflective of the customary international law rule, provides ‘[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.’ Künemann argues that this rule simply prevents a state from contending that a treaty to which it is party is not applicable in part of its territory and is not also intended to prevent extraterritorial application of the treaty in the absence of explicit provision: Rolf Künemann, ‘Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 201–2.

72 Sigrun I Skolgy and Mark Gibney, ‘Transnational Human Rights Obligations’ (2002) 24 *Human Rights Quarterly* 781, 790–1.

73 Künemann (2004), above n 71, 204.

74 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(1).

anything that would interfere with the exercise of these rights. However, no state has enough resources to single handedly protect and fulfil the *ICESCR* rights of every person in the world, so it may well be necessary to read in some kind of limitation on the scope of state parties' individual protect and fulfil obligations under *ICESCR* in order to render them meaningful.

In elaborating the obligations of states under *ICESCR*, the Committee on Economic, Social and Cultural Rights ('CESCR') tends in fact to speak of the obligations being owed by states to individuals within their 'jurisdiction'.⁷⁵ In its Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*,⁷⁶ the ICJ agreed with CESCR that Israel's *ICESCR* obligations 'apply to all territories and populations under its effective control'.⁷⁷ Beyond this, it is worth turning to the jurisdiction jurisprudence in relation to other human rights treaties for further guidance. Given that '[a]ll human rights are universal, indivisible and interdependent and interrelated',⁷⁸ it seems reasonable to assume that 'jurisdiction' for the purposes of a state's *ICESCR* obligations is as wide a concept as for the purposes of its *ICCPR* and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT') obligations.⁷⁹ The view taken by the United Nations ('UN') Human Rights Committee, in the context of the *ICCPR*, is that an individual is subject to the jurisdiction of a state party where he or she is present in territory over which the state exercises effective control *or* where he or she is personally under the effective control of an agent of the state anywhere.⁸⁰ The UN Committee against Torture applies an identical jurisdiction test in the context of *CAT*.⁸¹ Assuming the same test applies in relation to *ICESCR*, a state's individual *ICESCR* obligations will be engaged extraterritorially whenever that state can be said to exercise effective control over the territory in which the impugned actions or omissions took place *or* effective control over the person who claims to be the victim of those actions or omissions. A state exercises effective control over territory outside its own borders when it is able to impose its will within that territory whether thorough the exercise of brute force *or* otherwise. Clearly, Australia cannot be said to be exercising effective control over the whole or any part of the territory of either Indonesia or PNG.

75 Narula, above n 55, 728–9.

76 [2004] ICJ Rep 136.

77 Ibid 181 citing CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, 30th sess, UN Doc E/C.12/1/Add.90 (23 May 2003) [31].

78 *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993 adopted 25 June) [5].

79 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

80 See Savitri Taylor, 'Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, 2008) 93, 111–15.

81 See discussion of Committee Against Torture, 41st sess, CAT/C/41/D/323/2007 (21 November 2008) ('*JVH v Spain*') in Kees Wouters and Maarten den Heijer, 'The Marine I Case: A Comment' (2010) 22(1) *International Journal of Refugee Law* 1.

In most of the human rights cases in which it has thus far been held that an individual has been under the effective control of a state, that individual has been physically detained by an agent of the state. As explained in Part II, many of the asylum seekers falling within the scope of the Indonesian RCA are in fact kept in closed detention centres. Some of those falling within the scope of the PNG RCA may well be detained also. However, the detaining state would in these instances be Indonesia and PNG respectively because their officials administer the centres, guard the detainees, and so on. Australian officials and IOM personnel avoid such direct involvement with the running of detention centres. The questions that then arise are whether there is a degree of control over an individual, falling short of detention, that nevertheless amounts to ‘effective control’; and whether Australia, acting through IOM, is exercising that degree of control over any of the asylum seekers falling within the scope of the RCAs. At the present stage of development of international jurisprudence, it seems highly unlikely that an individual would be regarded as being subject to the effective control of a state unless an agent of that state is exercising some kind of coercive power over that person. Although a desire to continue receiving IOM assistance gives asylum seekers who are living in IOM accommodation an incentive to comply with IOM’s wishes, there is no evidence to suggest that IOM or Australian officials are actually exercising coercive power over those asylum seekers.

2 *Steps through International Assistance and Cooperation*

At this point though it is worth recollecting that *ICESCR* article 2(1) imposes an explicit obligation that is not contained in *ICCPR* article 2(1). State parties to *ICESCR* must also engage in ‘international assistance and cooperation ... with a view to achieving progressively the full realization of’ *ICESCR* rights. What exactly does the reference to ‘international assistance and cooperation’ in *ICESCR* article 2(1) require of states?

(a) *Respect*

In *General Comment No 12*, CESCR said that ‘States parties should take steps to respect the enjoyment of the right to food in other countries’, but this was surely to understate the obligation.⁸² In *General Comment No 14* the Committee used a stronger formulation, saying that ‘[t]o comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries’.⁸³ It used an almost identical formulation in *General Comment No 15*, in relation to the right to water, and said in elaboration that ‘[i]nternational cooperation requires States parties to refrain from

82 CESCR, *General Comment No 12: The Right to Adequate Food*, 20th sess, UN Doc E/C.12/1995/5 (12 May 1999) [36]. For arguments justifying the giving of significant weight to CESCR’s interpretations, see Craven, above n 70, 3–4; Sepúlveda, above n 69, 87–110.

83 CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, 22nd sess, UN Doc E/C.12/2004/4 (11 August 2000) [39].

actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries'.⁸⁴ Similarly, in *General Comment No 19*, CESCR said:

To comply with their international obligations in relation to the right to social security, States parties have to respect the enjoyment of the right by refraining from actions that interfere, directly or indirectly, with the enjoyment of the right to social security in other countries.⁸⁵

More particularly still, CESCR has said that a violation of the right to food can occur through 'the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations'.⁸⁶ Likewise, CESCR has said that 'the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organisations and other entities, such as multinational corporations' is a violation of the obligation to respect that right.⁸⁷ CESCR has also said that the 'failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organisations' is a violation of that right.⁸⁸ Finally, in *General Comment No 19*, CESCR generalised the proposition stating that 'the failure of a State party to take into account its Covenant obligations when entering into bilateral or multilateral agreements with other States, international organisations or multinational corporations' would constitute a violation of those obligations.⁸⁹

If Australian officials could be said to be guilty of a failure to take possible adverse impacts on the enjoyment of *ICESCR* rights into account in entering either or both of the RCAs under consideration, then perhaps Australia could be said to have violated the rights not taken into account. Funding the provision of assistance to asylum seekers through these arrangements does on the face of it seem a good thing to do. However, it would not have been appropriate for Australia to assume without investigation that the arrangements would have only positive impacts on their enjoyment of *ICESCR* rights.

Australian funding of the Tanjung Pinang detention centre expansion is an example of reasonably foreseeable negative impacts being ignored. The Indonesian government is supposed to take responsibility for the detention centre's future operational costs and maintenance, but it is unlikely that the

84 CESCR, *General Comment No 15: The Right to Water*, 29th sess, UN Doc E/C.12/2002/11 (20 January 2003) [31].

85 CESCR, *General Comment No 19: The Right to Social Security*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [53].

86 CESCR, *General Comment No 12: The Right to Adequate Food*, 20th sess, UN Doc E/C.12/1995/5 (12 May 1999) [19].

87 CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, 22nd sess, UN Doc E/C.12/2004/4 (11 August 2000) [50].

88 CESCR, *General Comment No 15: The Right to Water*, 29th sess, UN Doc E/C.12/2002/11 (20 January 2003) [44]. CESCR characterised this as a violation of the obligation to fulfil the right. However, it seems more logical to characterise such a violation as CESCR did in *General Comment No 14* as a violation of the obligation to respect the right.

89 CESCR, *General Comment No 19: The Right to Social Security*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [65].

necessary money will be found.⁹⁰ In other words, it is unlikely that ‘international standards’ will be maintained long-term. As a general rule, living conditions for IOM supported asylum seekers in Indonesian immigration detention centres are far worse than living conditions for IOM supported asylum seekers in the community. If the Tanjung Pinang detention centre had not been expanded, it is likely that a greater proportion of asylum seekers would be living in the community.

(b) *Protect*

In relation to the ‘international assistance and cooperation’ aspect of the obligation to *protect ICESCR* rights, Fons Coomans suggests that ‘[t]he obligation to protect includes an obligation for the state to ensure that all other bodies subject to its control (such as transnational corporations based in that state) respect the enjoyment of rights in other countries’.⁹¹ The guidance provided by CESCR on this question has been in the context of elaborating the content of particular substantive rights, and has not been entirely consistent. In *General Comment No 19*, CESCR used a similar formulation to Coomans, saying:

Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.⁹²

However, it has used more expansive formulations in previous General Comments. In *General Comment No 15*, it said:

Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.⁹³

90 Interview with Riau Islands Imigrasi official 1 (30 June 2009); Interview with Riau Islands Imigrasi official 2 (1 July 2009); Interview with Ohan Suryana, Head of Tanjung Pinang Immigration Office (16 July 2009). IOM notes that ‘Indonesian detention centres have been in a state of disrepair for many years, because [Imigrasi] has insufficient funds to provide regular maintenance and do repair’: IOM Indonesia, *Annual Report* (2009) 64. There is no reason to suppose that Tanjung Pinang detention centre will be an exception to this rule unless external funding is provided.

91 Fons Coomans, ‘Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 183, 192.

92 CESCR, *General Comment No 19: The Right to Social Security*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [54].

93 CESCR, *General Comment No 15: The Right to Water*, 29th sess, UN Doc E/C.12/2002/11 (20 January 2003) [33].

Similarly, in *General Comment No 14*, it specified:

To comply with their international obligations in relation to article 12, States parties have to ... prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.⁹⁴

The more expansive formulation appears more appropriate in the context of the RCAs. In discussing moral responsibility for the consequences of actions, the philosopher J R Lucas argued:

If I choose to act, I thereby take on a special responsibility of care, to consider all the possible consequences of my action, and to make sure that nothing untoward comes of it.⁹⁵

Since the RCAs have come into existence at Australia's instigation and exist to serve Australia's border control objectives, it seems only reasonable to postulate that Australia is required to make every possible effort to ensure that 'nothing untoward' comes of them. Australia is in a position to influence, if not control, IOM through its funding of the RCAs. Since PNG is dependent on Australian aid, Australia is in a position to exert strong influence over PNG. Australia's ability to influence Indonesia's conduct is far more limited, but that should not excuse it from making the attempt. In short, it is argued that, unless Australia uses whatever influence it has as far as it is able to prevent IOM, PNG and Indonesia (as the case may be) from depriving asylum seekers subject to the arrangements of their *ICESCR* rights, it will be in violation of the 'international assistance and cooperation' aspect of its obligation to protect *ICESCR* rights.

When asked by Senator Hanson-Young at the May 2010 budget estimates whether 'human rights standards and the protection of human rights are actually referenced' in the contracts DIAC has with IOM for delivery of RCA services,⁹⁶ DIAC officials could not immediately provide an answer. They undertook instead to let the senator know 'whether that is specifically contained in letters of agreement or whether it is understood on the basis of IOM's charter and governing principles and other documents that surround the organisation and the role and the mandate of that particular body'.⁹⁷ The answer has not yet been provided, at least to the public. If human rights standards are not explicitly written into the contracts, however, Australia is clearly failing to do all that it can to protect *ICESCR* rights. It is also arguable that Australia is using whatever power it has to influence the Indonesian government in a way that actually encourages and enables deprivation of rights. DIAC's 2009–10 budget made an allocation of AU\$5 million in 2009–10 and AU\$1 million in 2010–11 to IOM for the MCIIP project including the further enhancement of Indonesia's immigration

94 CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, 22nd sess, UN Doc E/C.12/2004/4 (11 August 2000) [39].

95 J R Lucas, *Responsibility* (Clarendon Press, 1993) 54.

96 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 26 May 2010, 92 (Senator Hanson-Young).

97 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 26 May 2010 (Andrew Metcalfe, Department of Immigration).

detention capacity.⁹⁸ In the 2010–11 budget, the 2010–11 allocation for the project was revised upwards to AU\$3 million and an allocation of AU\$17.8 million was made for 2011–12.⁹⁹ The accompanying item description states that the item deliverables include ‘[p]ayment to IOM to establish an additional immigration detention and transit facility in Indonesia’.¹⁰⁰ Moreover, it is very clear that Australia is actively encouraging the incarceration of asylum seekers. According to a DIAC official:

One issue that we have seen is that the Indonesian law enforcement authorities have been very active in helping to identify and intercept boatloads or groups of people en route to Australia but have not had the facilities in which to accommodate those people in a secure way.

There has been the regular occurrence of people being located and detained but then being able to get away from that particular arrangement. The funding here is to provide additional funds to Indonesia to strengthen its capacity to manage those people. So it is part of the arrangements but a ramping up of the arrangements to try and assist Indonesia to prevent, detect and hold people so that they are processed in Indonesia. That, of course, plays into an overall expectation that that would suppress the number of people coming to Australia.¹⁰¹

Admittedly Australia has taken some steps to ensure that conditions within detention centres are human rights compliant. The SOPs that IOM has developed in collaboration with Imigrasi as part of the MCIIP project ‘use human rights instruments for their framework’.¹⁰² They are intended to ‘provide guidance on the care of all detainees in relation to food, healthcare, communication, grievances and other aspects of daily life in a detention facility’ and ‘provide for the needs of special groups including individuals with a disability and unaccompanied minors’.¹⁰³ On the other hand, the Australian government responds to questions about the standards of health, hygiene, human rights and security it requires in detention centres funded by it, the measures it has in place to ensure the standards are met and maintained and so on, with some variation of the following statement: ‘the Indonesian government is responsible for detention facilities in Indonesia’.¹⁰⁴

98 Australian Government, *Portfolio Budget Statements 2009–10: Budget Related Paper No 1.12 Immigration and Citizenship Portfolio* (2009) 71, 76; Yuko Narushima and Jonathan Pearlman, ‘Aid Given to Sri Lanka to Stem People Smuggling’, *The Sydney Morning Herald* (online), 16 October 2009 <<http://www.smh.com.au/national/aid-given-to-sri-lanka-to-stem-people-smuggling-20091015-gz9y.html>>.

99 Australian Government (2010), above n 42, 59.

100 Ibid 55.

101 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 27 May 2010, 37 (Andrew Metcalfe, Department of Immigration).

102 IOM Indonesia, above n 13, 86.

103 Ibid 89. At the end of 2009, the SOPs were still awaiting formal adoption by Imigrasi in the form of directives and manuals: IOM Indonesia, *Annual Report* (2010) 65.

104 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 February 2010, 149–150 (Robert McClelland).

(c) *Fulfil*

Finally turning to the ‘international assistance and cooperation’ aspect of the obligation to fulfil, CESCR said in *General Comment No 12* that ‘States parties should take steps ... to facilitate access to food [in other countries] and to provide the necessary aid when required’.¹⁰⁵ Subsequent General Comments have contained stronger and more elaborate formulations. *General Comment No 14* specifies that ‘[d]epending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required’.¹⁰⁶ *General Comment No 15* states:

Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. ... The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.¹⁰⁷

General Comment No 19 relating to the right to social security contains a similar formulation to *General Comment No 15*.¹⁰⁸

All of the Australian government expenditure detailed in Part II is classified as overseas development assistance to the countries concerned.¹⁰⁹ In its *Concluding Observations on Australia’s Fourth Periodic Report* under ICESCR, CESCR regretted that Australia had only devoted 0.32 per cent of GNP to overseas development assistance (‘ODA’) in 2008–09¹¹⁰ and recommended that it increase its ODA to the UN target of 0.7 per cent of GNP.¹¹¹ However, the implementation of the recommendation is not necessarily going to help the asylum seekers subject to the RCAs. Is there a reason why Australia should fulfil the content of ICESCR rights in relation to this particular subset of the rest of the world?

Manisuli Ssenyonjo has suggested that it is ‘unlikely that the Committee can direct a specific developed state to assist a particular developing state party since there are no criteria for doing so in the *Covenant*, and it is unlikely that the

105 CESCR, *General Comment No 12: The Right to Adequate Food*, 20th sess, UN Doc E/C.12/1995/5 (12 May 1999) [36].

106 CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, 22nd sess, UN Doc E/C.12/2004/4 (11 August 2000) [39].

107 CESCR, *General Comment No 15: The Right to Water*, 29th sess, UN Doc E/C.12/2002/11 (20 January 2003) [34].

108 CESCR, *General Comment No 19: The Right to Social Security*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [55].

109 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 27 May 2010, 37 (Andrew Metcalfe, Department of Immigration).

110 The budgeted percentage for 2009–10 was 0.34: Stephen Smith and Bob McMullan, *Budget: Australia’s Development Assistance Program* (May 2009) Australian Government, iv <http://www.budget.gov.au/2009-10/content/ministerial_statements/ausaid/download/ms_ausaid.pdf>.

111 CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [12]. CESCR often makes such a recommendation to states falling short of the UN target: Sepúlveda, above n 69, 374–5.

Committee would develop this in the near future'.¹¹² As we have seen, however, by setting up the RCAs – that is, choosing to act – Australia has put itself in a relationship with the asylum seekers affected by its actions, which engenders extraterritorial obligations to respect and protect their *ICESCR* rights. Why not obligations to fulfil those rights as well?

The obligation to fulfil can be broken down into obligations to 'facilitate, promote and provide'.¹¹³ Ssenyonjo explains that the obligation to provide is triggered 'when individuals or groups are unable, on grounds reasonably considered to be beyond their control, to realise these rights themselves, with the means at their disposal'.¹¹⁴ He adds that this is 'especially the case' in relation to 'particularly vulnerable or disadvantaged' individuals such as asylum seekers and refugees.¹¹⁵ Since Indonesia and PNG rarely if ever give formal work rights to asylum seekers and refugees within their respective territories, they cannot realise their *ICESCR* rights themselves. It is argued therefore that Australia has an obligation to provide *ICESCR* rights to the asylum seekers caught by the RCAs to the extent that no other actor does.

It is not possible within the scope of this paper to examine the substantive content of all of the rights set out in *ICESCR* and to consider whether Australia has, on the facts, breached its obligation to fulfil those rights in relation to individuals subject to the RCAs. What will be considered instead is whether Australia is fulfilling its *ICESCR* obligations without discrimination as required by *ICESCR* article 2(2). *ICESCR* article 2(2) provides:

The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status.¹¹⁶

When the wording of article 2(2) ('undertake to guarantee') is contrasted with the wording of article 2(1) it becomes obvious that immediate realisation of the obligation of non-discrimination is required.¹¹⁷ The question that is particularly worth exploring here is whether differential treatment by Australia of asylum seekers subject to the RCAs on the one hand and asylum seekers within Australian territory on the other amounts to discrimination on the basis of 'other status'. According to *ICESCR*, 'place of residence' is included within the term

112 Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, 2009) 80.

113 *Ibid* 25.

114 *Ibid*.

115 *Ibid* 25–6.

116 Nationality is a prohibited ground of discrimination falling within the term 'other status': *ICESCR, General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [30]. A state may not discriminate against non-nationals in giving effect to *ICESCR* rights except as provided in art 2(3), which states '[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.' The exception is one upon which Australia, a *developed* country, cannot rely.

117 Craven, above n 70, 181.

‘other status’ as a prohibited ground of discrimination.¹¹⁸ It is not possible, however, to jump from the fact of differential treatment on the basis of place of residence to the conclusion that there is discrimination on that basis. Differential treatment will not be regarded as discriminatory if there is a ‘reasonable and objective’ justification for it.¹¹⁹ In order for this to be the case, the difference in treatment must have a legitimate aim and ‘there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measure or omissions and their effects’.¹²⁰

The Australian government freely admits that the conditions in Indonesian detention centres are not as good as those in Australia.¹²¹ Even the Australian funded expansion of the Tanjung Pinang detention centre was designed, in close consultation with DIAC and IOM,¹²² to meet accepted international standards and not higher Australian standards. For example, it has dormitory style sleeping quarters for detainees rather than ‘a single room for each person, which would be the accepted norm in Australia’.¹²³ Similarly, IOM sources community housing for RCA asylum seekers that is ‘of an appropriate standard in Indonesian conditions’ and DIAC has explicitly stated that it does not expect the housing ‘to be anything over and above the normal conditions for housing in Indonesia’.¹²⁴ Presumably Australia adopts the same position, *mutatis mutandis*, in relation to the PNG RCA.

Since Indonesia and PNG are both lower middle income countries,¹²⁵ the normal level of enjoyment of *ICESCR* rights in those countries is lower than in Australia, which is a high income OECD country. IOM has admitted that the quality of housing and other facilities that it provides to asylum seekers in Indonesia is inferior to that which was provided in Australia’s IOM run processing centres in Nauru and PNG (now closed), but justifies this on the basis that provision of better living conditions for asylum seekers living in the midst of local communities would arouse resentment.¹²⁶ This fear is shared by Indonesian officials and UNHCR. In fact, UNHCR proffers a similar rationale for calibrating the material support it provides to recognised refugees in both Indonesia and

118 CESCR, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [34]. Admittedly the examples given by CESCR do not include the factual scenario under consideration here, but, as CESCR points out, ‘a flexible approach to the ground of “other status” is ... needed’ because ‘[t]he nature of discrimination varies according to context and evolves over time’: at [27].

119 *Ibid* [13].

120 *Ibid*.

121 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 20 October 2009, 87 (Chris Evans, Minister for Immigration).

122 Department of Immigration and Citizenship, above n 35, 154.

123 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 9 February 2010, 90 (Arja Keski-Nummi, Department of Immigration).

124 *Ibid*.

125 World Bank, *World Bank List of Economies* (July 2010)

<<http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS>>.

126 Australian Broadcasting Corporation Four Corners, *Interview with Richard Danziger* (15 April 2002) <<http://www.abc.net.au/4corners/stories/s530005.htm>>.

PNG to the standard of living that is the norm for local communities.¹²⁷ To the extent that hostility towards asylum seekers has the potential to spill over into violence or other forms of social instability endangering both asylum seekers and local communities, the aim of avoiding the creation of such hostility seems legitimate. The real issue is proportionality of means to ends. In Indonesia, asylum seekers are housed by IOM in 'normal community accommodation such hotels, motels, apartments and houses'.¹²⁸ Jessie Taylor, who visited many IOM supported asylum seekers in Indonesia in July 2009, has described their living conditions as 'rang[ing] from acceptable to appalling'.¹²⁹ At the appalling end, she describes a 'converted grain storage warehouse' in Lombok that is used by IOM to accommodate up to ten single men at a time.¹³⁰ It has a kitchen 'open to the elements and covered in fungus and mould', a 'filthy toilet' with a hose over it serving as a shower, a water supply that is 'polluted and contaminated' and '[i]nfestations of rodents and snakes'.¹³¹ The provision of housing that is unfit for human habitation cannot possibly be described as a proportionate means of achieving any legitimate end, and, since the provision of such substandard housing to asylum seekers in Australia would not be tolerated, it can be characterised as a failure on Australia's part to fulfil the *ICESCR* right to an adequate standard of living without discrimination.

IV CONCLUSION

The purpose of this paper was to investigate whether Australia has managed to avoid incurring *ICESCR* obligations towards asylum seekers caught by the RCAs it has in place in Indonesia and PNG. The investigation has wider significance insofar as Australia has demonstrated a clear inclination to replicate the arrangements elsewhere as well. The finding made in Part II(A) of this paper was that the conduct of Australia's DIAC and other officials in setting up and maintaining the RCAs are attributable to Australia and, in all likelihood, so too is the conduct of IOM personnel in implementing the RCAs. Of course, conduct attributable to Australia can only be characterised as internationally wrongful if it is in breach of Australia's international obligations. Part II(B), therefore, examined the extent to which Australia has extraterritorial *ICESCR* obligations. It was found in Part II(B)(1) that Australia's obligations to take steps individually to protect and fulfil *ICESCR* rights are probably only triggered in respect of individuals who are subject to its effective control and that the asylum seekers assisted under the RCAs probably cannot be characterised as subject to such control. However, it was found in Part II(B)(2) that Australia's obligations to

127 See, eg, UNHCR, *Country Operations Plan 2007 Papua New Guinea* (1 September 2006) <<http://www.unhcr.org/452f50342.html>>.

128 IOM, above n 21, 7.

129 Taylor, above n 45, 4.

130 *Ibid* 15.

131 *Ibid* 15–16.

take steps through international assistance and cooperation to respect, protect and fulfil *ICESCR* rights have probably been engaged through its entry into the RCAs. Moreover, examples were given of possible breaches of those obligations by Australia, suggesting that Australia's mistaken belief that it is able to claim 'all care but no responsibility' for the asylum seekers caught by the RCAs has resulted in it taking something less than 'all care'. Hopefully, the realisation that it is theoretically accountable under international law for the impacts that the RCAs have on the human rights of asylum seekers will have a salutary effect on Australia's future conduct.