

DETENTION OF AUSTRALIA'S ASYLUM SEEKERS IN NAURU: IS DEPRIVATION OF LIBERTY BY ANY OTHER NAME JUST AS UNLAWFUL?

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I INTRODUCTION

In 2001, the small and economically struggling Pacific nation of Nauru became an integral part of Australia's border protection policies under what came to be known as the 'Pacific Solution'. In that year, Australia's Coalition Government introduced radical and unprecedented measures to deter asylum seekers from coming to Australia by boat, which included the transfer of asylum seekers from Australian territory to Australia's former protectorates of Nauru and Papua New Guinea ('PNG') for detention and status determination.¹ The detention centre in PNG ceased operation in 2004 while the detention centre in Nauru continued to be utilised until December 2007, when Australia's newly elected Labor Government ended what it labelled the 'cynical, costly and ultimately unsuccessful exercise' of extraterritorial detention and processing.²

The Labor Party's objections to transferring asylum seekers to extraterritorial facilities were, however, short lived. The Labor Government resumed an interest in this policy approach following a rise in the number of asylum seekers arriving irregularly by boat, as well as a sustained campaign by the Coalition linking the rise of irregular boat arrivals to a softening of the Government's asylum

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1 For an in-depth consideration of the 'Pacific Solution' and its related legal issues, see Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* 696; Penelope Mathew, 'Australian Refugee Protection in the Wake of the *Tampa*' (2002) 96 *American Journal of International Law* 661; Tania Penovic and Azadeh Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime' (2007) 13 *Australian Journal of Human Rights* 33.

2 Chris Evans, Minister for Immigration and Citizenship, 'Last Refugees Leave Nauru' (Media Release, 8 February 2008) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYUNP6%22>>.

seeker policies, including the suspension of the 'Pacific Solution'.³ The Labor Government announced the resumption of the transfer of asylum seekers to Nauru and PNG in August 2012.⁴ Australia signed an initial *Memorandum of Understanding* ('MOU') with Nauru on 29 August 2012.⁵ An MOU with PNG, allowing for the transfer of Australia's asylum seekers to PNG, was also signed in September 2012.⁶

On 19 July 2013, the Labor Government, under the leadership of Kevin Rudd, changed its approach to asylum seekers once again by announcing that asylum seekers arriving after 19 July 2013 would no longer be processed or resettled in Australia but would be transferred to either Nauru or PNG for processing and possible resettlement. Australia negotiated a Regional Resettlement Arrangement with the Government of PNG,⁷ which allows for asylum seekers to be resettled in PNG if found to be refugees. All asylum seekers found not to be refugees are to be repatriated under the arrangement. The 2012 MOU with Nauru was also renegotiated on 3 August 2013 to allow for the resettlement of refugees in Nauru.⁸ Clause 12 of the 2013 MOU provides: 'The Republic of Nauru undertakes to enable transferees who it determines are in need of international protection to settle in Nauru, subject to agreement between Participants on arrangements and numbers'.

Following the announcement that asylum seekers would no longer be resettled in Australia, the majority of asylum seekers who had been transferred to Nauru prior to the 19 July 2013 deadline were returned to Australia. The United Nations High Commissioner for Refugees ('UNHCR') presumes that this transfer of asylum seekers, back to Australia, occurred 'ostensibly to accommodate the

3 Mary Crock, 'First Term Blues: Labor, Refugees and Immigration Reform' (2010) 17 *Australian Journal of Administrative Law* 205. See also Mary Crock and Daniel Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals' (2010) 19 *Griffith Law Review* 238.

4 Republic of Nauru and Commonwealth of Australia, *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru and Related Issues* (Intergovernmental Agreement, 29 August 2012).

5 Ibid.

6 Independent State of Papua New Guinea and Commonwealth of Australia, *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues* (Intergovernmental Agreement, 8 September 2012).

7 Independent State of Papua New Guinea and Commonwealth of Australia, *Regional Resettlement Arrangement between Australia and Papua New Guinea* (Intergovernmental Agreement, 19 July 2013). See also Independent State of Papua New Guinea and Commonwealth of Australia, *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues* (Intergovernmental Agreement, 6 August 2013).

8 Republic of Nauru and Commonwealth of Australia, *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru and Related Issues* (Intergovernmental Agreement, 3 August 2013).

transfer of future arrivals from the post-19 July period'.⁹ One group exempt from the transfer back to Australia was asylum seekers involved in unrest in Nauru on 19 July 2013 which led to fires and the destruction of 80 per cent of the buildings in the Nauruan regional processing centre ('RPC').¹⁰

The resumption of the transfer of asylum seekers to Nauru in 2012 by the Labor Government and their resettlement in PNG and Nauru were supported by the Coalition. The leader of the then Opposition, Tony Abbott, stated in July 2013 that if elected he would 'be prepared to rapidly ramp up the capacity of Nauru to 2000 [asylum seekers] and beyond'.¹¹ 'Increasing capacity at offshore processing centres' became a Coalition promise during the election campaign and a priority for it in its first 100 days in office.¹² Following the election of the Coalition Government in September 2013, Australia instigated Operation Sovereign Borders, which is 'a military-led response'¹³ to 'unauthorised maritime arrivals'¹⁴ and includes transfer of asylum seekers to extraterritorial facilities as a key tenet.¹⁵ It continues to be Australian Government policy that all asylum seekers who arrive in Australia irregularly by boat will be transferred to either Nauru or PNG,¹⁶ and will not be resettled in Australia.¹⁷

This article will examine the detention of Australia's asylum seekers in Nauru. In particular, this article will assess the conformity of the 2013 *MOU* between Australia and Nauru with the protections against unlawful deprivation of liberty under the *Constitution of Nauru* and the protections against arbitrary detention afforded to asylum seekers under international law.

The article will begin by discussing the transfer of asylum seekers by Australia to Nauru and the legality of this arrangement under Australian municipal law. The article will then discuss the arrangements for asylum seekers

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- 9 UNHCR Regional Representation, *UNHCR Monitoring Visit to the Republic of Nauru: 7 to 9 October 2013* (Report, 26 November 2013) 8 [34].
 - 10 'No Charges Yet over Nauru Riot because Identity Papers Were Destroyed', *ABC News* (online), 23 July 2013 <<http://www.abc.net.au/news/2013-07-23/no-charges-over-riot-because-identity-papers-destroyed-says-nau/4837322>>.
 - 11 ABC News, 'Critics Question Asylum Policy's Legality and Morality', 7.30, 30 July 2013 (Tony Abbott) <<http://www.abc.net.au/news/2013-07-30/critics-question-asylum-policys-legality-and/4854492>>.
 - 12 Liberal Party of Australia, 'Operation Sovereign Borders' (Media Release, 26 July 2013) <<http://www.liberal.org.au/latest-news/2013/07/26/operation-sovereign-borders>>.
 - 13 Liberal Party of Australia and National Party of Australia, *The Coalition's Operation Sovereign Borders Policy* (Policy Document, July 2013) 2.
 - 14 For a definition of 'unauthorised maritime arrival', see *Migration Act 1958* (Cth) s 5AA ('*Migration Act*'). For a definition of 'unlawful non-citizen', see *Migration Act* s 14.
 - 15 Liberal Party of Australia and National Party of Australia, *The Coalition's Operation Sovereign Borders Policy* (Policy Document, July 2013) <http://lpaweb-static.s3.amazonaws.com/Policies/OperationSovereignBorders_Policy.pdf>.
 - 16 ABC News, 'Scott Morrison Describes "Secrecy with a Purpose" in Asylum Policy', 7.30, 14 January 2014 (Scott Morrison) <<http://www.abc.net.au/7.30/content/2013/s3925614.htm>>.
 - 17 Liberal Party of Australia and National Party of Australia, above n 15.

once they are in Nauru. It will demonstrate that the confinement of asylum seekers in the RPC constitutes detention under the municipal law of Nauru and international law, notwithstanding the recently announced open centre arrangement at the RPC or objections to such a characterisation from Australia and Nauru.

The article will go on to argue that the detention of refugees in Nauru under the 2013 *MOU* is likely to be unlawful under the *Constitution of Nauru*, because their detention is not for the purpose of effecting their removal from Nauru. Furthermore, the detention of asylum seekers who are subject to lengthy delays in processing, and thus to lengthy delays in release from detention (regardless of whether or not they are ultimately released into the Nauruan community), may be in contravention of the *Constitution of Nauru*.

The article will then analyse the extraterritorial application of the *International Covenant on Civil and Political Rights*.¹⁸ It will argue that the *ICCPR* applies to Australia in its exercise of jurisdiction in Nauru, and that Australia is in violation of articles 9(1) and 9(4) of the *ICCPR*. The article will further assess the obligation of both Australia and Nauru to refrain from the arbitrary detention of children and will demonstrate that asylum seeker children are detained in Nauru in contravention of article 37(b) of the *Convention on the Rights of the Child*.¹⁹ The article will conclude by arguing that the release of asylum seekers into the Australian community is the best option for ensuring that Australia and Nauru comply with the *Constitution of Nauru* and their obligations under the *ICCPR* and *CRC*.

II TRANSFER OF ASYLUM SEEKERS UNDER AUSTRALIAN MUNICIPAL LAW

Under the 2013 *MOU* between Australia and Nauru, Australia transfers to Nauru persons who:

- a) have travelled irregularly by sea to Australia; or
- b) have been intercepted by Australian authorities in the course of trying to reach Australia by irregular maritime means; and
- c) are authorised by Australian law to be transferred to Nauru; and
- d) have undergone short health, security and identity checks in Australia.²⁰

18 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

19 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

20 Republic of Nauru and Commonwealth of Australia, *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru and Related Issues* (Intergovernmental Agreement, 3 August 2013) cl 9.

Nauru's association with the former Liberal Government's 'Pacific Solution' initially made the country an unattractive choice for the Labor Government when considering the transfer of asylum seekers to extraterritorial facilities. The Labor Government first approached Malaysia and Timor Leste, seeking to create a new extraterritorial regime that could be politically differentiated from the Liberal Party policy.²¹ However, Australia was unsuccessful in its negotiations with Timor Leste,²² while plans for a 'Malaysian Solution' were thwarted in August 2011 when the Australian High Court ruled that the transfer of asylum seekers to Malaysia under the conditions proposed was unlawful.²³ Nauru and PNG were only adopted as extraterritorial processing facilities in response to advice received from an Expert Panel on Asylum Seekers,²⁴ when other options were no longer politically or legally viable for the Australian Government.

The ruling of the High Court in the *Malaysian Solution Case* rested on the inconsistency of Australia and Malaysia's arrangements with section 198A (as it then was) of the *Migration Act*.²⁵ To circumvent the finding of the High Court when reintroducing extraterritorial processing in Nauru and PNG, the Government repealed section 198A of the *Migration Act* and introduced a new section 198AB. This section empowers the Minister for Immigration to designate a country as a 'regional processing country' upon satisfying the sole condition that 'the Minister thinks that it is in the national interest to designate the country to be a regional processing country'.²⁶ Furthermore, section 198AD of the *Migration Act* now mandates an officer to 'as soon as reasonably practicable, take an unauthorised maritime arrival ... from Australia to a regional processing

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- 21 Chris Bowen, Minister for Immigration and Citizenship, 'Minister Bowen to Engage with Regional Partners on Border Protection and People Smuggling' (Media Release, 8 October 2010) <<http://www.chrisbowen.net/media-centre/media-releases.do?newsId=3764>>.
 - 22 Lindsay Murdoch, 'East Timor Dumps Bilateral Talks on Refugee Centre', *The Sydney Morning Herald* (online), 29 April 2011 <<http://www.smh.com.au/national/east-timor-dumps-bilateral-talks-on-refugee-centre-20110428-1dynq.html?skin=text-only>>.
 - 23 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Malaysian Solution Case*'). See Michelle Foster, 'The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 *Melbourne Journal of International Law* 395.
 - 24 The Expert Panel was asked to outline the best options for preventing asylum seekers from risking their lives on dangerous boat journeys to Australia. One recommendation put forward by the Panel was the resumption of processing in Nauru. However, the Panel also stated that asylum seekers 'who have their claims processed in Nauru would be provided with protection and welfare arrangements consistent with Australian and Nauruan responsibilities under international law, including the *Refugees Convention*'. This included 'treatment consistent with human rights standards (including no arbitrary detention)': Australian Government, *Report of the Expert Panel on Asylum Seekers* (Report, August 2012) 48 [3.46] <<http://electionwatch.edu.au/sites/default/files/docs/Houston%20Panel%20Report.pdf>>.
 - 25 The High Court also found that the Minister for Immigration was the guardian of unaccompanied children under the *Immigration (Guardianship of Children) Act 1946* (Cth) s 6 and had failed to give consent in writing for the removal of the unaccompanied children.
 - 26 The amendments were made pursuant to the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

country'. Nauru was designated as a 'regional processing country' on 10 September 2012.

The High Court upheld the constitutional validity of sections 198AB and 198AD of the *Migration Act* in its June 2014 decision of *Plaintiff S156/2013 v Minister for Immigration and Border Protection*.²⁷ The High Court also found that what constitutes the national interest 'is largely a political question' and is to be determined by the Minister.²⁸ The High Court further determined that the custody or detention of asylum seekers transferred to third country processing centres is not relevant to the validity of the transfer under Australian law.²⁹ The decision in *Plaintiff S156/2013* made it clear that the validity of sections 198AB and 198AD of the *Migration Act* does not turn on the conditions or arrangements in Australia's extraterritorial processing facilities.

III ARRANGEMENTS FOR THE CONFINEMENT OF ASYLUM SEEKERS AT THE REGIONAL PROCESSING CENTRE IN NAURU

While the Australian High Court was not concerned with the arrangements for the confinement of asylum seekers in Nauru when assessing the legality of Australia's transfer of asylum seekers to third party processing centres, the arrangements remain relevant to the question of the lawfulness of detention under the municipal law of Nauru and international law.

Nauruan law requires all non-citizens to have a visa in Nauru. To facilitate the hosting of asylum seekers in Nauru, asylum seekers transferred by Australia are provided with a regional processing centre visa.³⁰ The Australian Government applies for this visa on behalf of the asylum seekers, who can be provided the visa without their consent.³¹ As a condition of the visa, asylum seekers must reside at the RPC. The operation of the RPC is regulated by the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru), which requires that asylum seekers be provided with adequate food, clean and sufficient clothing, access to medical facilities, education for children and access to facilities for communication (including electronic forms such as email).³²

27 (2014) 88 ALJR 690 ('*Plaintiff S156/2013*').

28 Ibid 698 [40] (The Court).

29 Ibid 694 [14], 697 [32] (The Court).

30 The visas are issued pursuant to the *Immigration Act 1999* (Nauru), and *Immigration Regulations 2013* (Nauru) reg 9(6). The 2013 regulations replaced the *Immigration Regulations 2000* (Nauru). For a report of the controversy surrounding the cost of these visas, see Simon Cullen, 'Nauru Hikes Asylum Seeker Visa Costs', *ABC News* (online), 26 October 2012 <<http://www.abc.net.au/news/2012-10-26/nauru-hikes-up-asylum-seeker-visa-costs/4334448>>.

31 *AG v Secretary of Justice* [2013] NRSC 10.

32 *Asylum Seekers (Regional Processing Centre) Act 2012* (Nauru) s 6(1).

As of 31 January 2015, 802 asylum seekers were held in the RPC in Nauru. This number included 119 children, 549 men and 134 women.³³ Asylum seekers transferred to Nauru by Australia are held in two facilities in the RPC.³⁴ The first, Regional Processing Centre 2 ('RPC2'), is for single men, many of whom were accused of being involved in the unrest in Nauru in July 2013. The UNHCR reported in October 2013 that the men are provided with 'medium-sized and large open-ended canvas tents sleeping between 7–10 individuals and approximately 50 individuals, respectively, on camp stretchers with minimal bedding. There is little privacy and few if any screens or divisions within tents'.³⁵ The UNHCR has also noted that asylum seekers in RPC2 had no internet access and did not have fans in their tents.³⁶ Only eight toilets and two urinals were provided for the 411 men at the time of the UNHCR's visit.

Asylum seeker families in Nauru are housed in Regional Processing Centre 3 ('RPC3'). Families are accommodated in large vinyl marquees that are partitioned for family groups. The Australian Human Rights Commission ('AHRC') reported that in November 2014 each of these marquees housed 12 to 15 families. The AHRC also reported 'little privacy [and] high noise levels' in the marquees.³⁷ Similarly, the UNHCR during its October 2013 visit 'observed cramped conditions [in RPC3], with very little privacy, in very hot conditions, with some asylum-seekers sleeping on mattresses on the ground'.³⁸

For the first three years after offshore processing resumed in 2012, asylum seekers were confined to the RPC at all times except in rare cases when they were permitted to take part in excursions.³⁹ On 25 February 2015, however, it was announced that an open centre arrangement had commenced at the RPC. Under the new arrangement, certain asylum seekers will have the opportunity to leave the RPC and to enter the Nauruan community for three days per week between the hours of 9.00am and 5.00pm. The open centre arrangement began with a select group of women and children, with the number of asylum seekers participating each week to be determined over time.⁴⁰

33 Department of Immigration and Border Protection, Australian Government, *Immigration Detention and Community Statistics Summary* (Report, 31 January 2015)

<<http://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-jan2015.pdf>>.

34 A third facility, Regional Processing Centre 1, was damaged by the fires of July 2013. It has now been rebuilt and is being used for staff working in the RPC.

35 UNHCR Regional Representation, above n 9, 14 [70].

36 Ibid 14 [72], 14 [76], 15 [80].

37 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Report, November 2014) 181 [12.1].

38 UNHCR Regional Representation, above n 9, 16 [87].

39 Department of Immigration and Border Protection, Australian Government, *Annual Report 2013–14* (15 September 2014) 190–202. The UNHCR observed in October 2013 that asylum seekers had very limited opportunities to leave the RPC for excursions: UNHCR Regional Representation, above n 9, 13 [62].

40 Government of the Republic of Nauru, 'Nauru Commences Open Centre Arrangements' (Media Release, 25 February 2015) <<http://www.naurugov.nr/government-information-office/media-release/nauru-commences-open-centre-arrangements.aspx>>.

Nauru conducts status determinations for asylum seekers pursuant to the *Refugees Convention Act 2012* (Nauru). Under the 2013 *MOU* with Australia, persons found to be refugees are released from the RPC into the Nauruan community on a temporary settlement visa. According to the Nauruan Government, approximately 500 refugees had been released from the RPC and were living in the Nauruan community as of 25 February 2015.⁴¹ Refugees released into the community are provided a caseworker who will assist them in finding employment.⁴² The refugees are also provided English language training and are assisted in establishing small businesses.⁴³

The Australian Government has also signed an agreement with the Government of Cambodia for the resettlement of refugees processed in Nauru.⁴⁴ From the limited information provided, it appears that all refugees processed in Nauru will be settled for a period of up to five years in Nauru, with some refugees voluntarily electing to be resettled in Cambodia.⁴⁵ All costs associated with the transfer of asylum seekers to Cambodia and their resettlement will be borne by Australia. The Australian Senate Legal and Constitutional Affairs Legislation Committee heard on 23 February 2015, however, that there is currently no provision in the Australian budget for the transfer of asylum seekers to Cambodia and no refugee had been transferred to Cambodia from Nauru at the time of the hearing.⁴⁶

Transfield Services, an engineering and construction company, has been contracted by the Australian Government to manage the day-to-day operations of the RPC and provide welfare, transport and accommodation services to asylum

41 Ibid. It has been reported that many refugees in the Nauruan community are unhappy with their situation, including their mistreatment by Nauruan citizens: Liam Fox and Sam Bolitho, 'Hundreds of Nauru Refugees Protest against "Slave-Like Living Conditions"', *ABC News* (online), 2 March 2015 <<http://www.abc.net.au/news/2015-03-02/nauru-refugees-protest-against-slave-like-conditions/6275236>>.

42 'The Leaked Nauru Resettlement Document – In Full', *The Guardian* (online), 28 April 2014 <<http://www.theguardian.com/world/interactive/2014/apr/28/leaked-nauru-resettlement-document-in-full>>.

43 Ibid.

44 The agreement is set out in the *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees in Cambodia* (Intergovernmental Agreement, 26 September 2014). As highlighted by the Andrew & Renata Kaldor Centre for International Refugee Law, there is very little concrete information in the two documents. For example, neither document specifies the entry and settlement requirements for Cambodia; the number of refugees to be resettled in Cambodia; or the cost of the resettlement of refugees for Australia: Andrew & Renata Kaldor Centre for International Refugee Law, *The Cambodia Agreement* (Fact Sheet, 14 October 2014).

45 Scott Morrison, Minister for Immigration and Border Protection (Press Conference, 22 May 2014) <<http://web.archive.org/web/20140826120255/http://www.minister.immi.gov.au/media/sm/2014/sm214759.htm>>.

46 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Immigration and Border Protection Portfolio, Parliament of Australia, Canberra, 23 February 2015, 101–2 (Kate Pope, First Assistant Secretary, Community and Settlement Services, Immigration Status Resolution Group).

seekers.⁴⁷ The Australian Government has also entered into a contract with International Health and Medical Services for the medical needs of the asylum seekers,⁴⁸ and with Save the Children for the care of children.⁴⁹

IV ARE ASYLUM SEEKERS DETAINED IN NAURU?

Both the Governments of Nauru and Australia object to the characterisation of the RPC as a detention centre.⁵⁰ They argue that asylum seekers in Nauru are not detained because they are accommodated within a regional processing centre rather than a detention centre;⁵¹ the restrictions on the movement of asylum seekers are a condition of their visa rather than detention;⁵² the asylum seekers can leave the RPC to take part in excursions;⁵³ and the asylum seekers are

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- 47 Transfield Services, *Manus and Nauru Fact Sheet* (2014) <http://www.transfieldservices.com/sectors/social/Manus_and_Nauru_fact_sheet>. This contract was executed on 24 March 2014: Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Immigration and Border Protection Portfolio, Parliament of Australia, Canberra, 23 February 2015, 113 (Mark Painting, Acting First Assistant Secretary, Infrastructure and Services, Immigration Status Resolution Group).
- 48 The current contract was executed on 29 January 2014 but was varied in April 2014 to expand some services (mainly in PNG): Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Immigration and Border Protection Portfolio, Parliament of Australia, Canberra, 23 February 2015, 113 (Mark Painting, Acting First Assistant Secretary, Infrastructure and Services, Immigration Status Resolution Group).
- 49 The current contract with Save the Children was executed on 1 September 2014: *ibid.* It has been reported that tension between the Australian Government and Save the Children has led to a reduction in the role of Save the Children in Nauru: Max Chalmers, 'Contractor's Work Slashed on Nauru after Year of Rocky Relations with Scott Morrison', *New Matilda* (online), 12 December 2014 <<https://newmatilda.com/2014/12/12/contractors-work-slashed-nauru-after-year-rocky-relations-scott-morrison>>. Adult Multicultural Education Services ('AMES') has been provided the contract for settlement services in the Nauruan community (including for children): Department of Immigration and Border Protection, Australian Government, *2014 Calendar Year Senate Order on Departmental and Agency Contracts Listing Relating to the Period 1 January 2014–31 December 2014* (Table, 2014) 2 <<http://www.immi.gov.au/About/documents/senate-orders/senate-order-calendar-year-2014.pdf>>.
- 50 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Immigration and Citizenship Portfolio, Parliament of Australia, Canberra, 15 October 2012, 139 (Martin Bowles, Acting Secretary); *AG v Secretary of Justice* [2013] NRSC 10. Both the Australian and Nauruan Governments also denied that the facilities used under the 'Pacific Solution', prior to December 2007, were detention centres. See Department of Immigration and Multicultural and Indigenous Affairs, 'Offshore Processing Arrangements' (Fact Sheet No 76, 23 May 2005) <<http://web.archive.org/web/20051025182708/http://www.immi.gov.au/facts/76offshore.htm>>. See also *Mahdi v Director of Police* [2003] NRSC 3; *Amiri v Director of Police* [2004] NRSC 1.
- 51 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Immigration and Citizenship Portfolio, Parliament of Australia, Canberra, 15 October 2012, 139 (Martin Bowles, Acting Secretary). It should be noted that these comments were made prior to the Coalition Government ceasing power in 2013.
- 52 *AG v Secretary of Justice* [2013] NRSC 10, [52].
- 53 *Ibid.*

free to return to their home countries.⁵⁴ The recently announced open centre arrangement, allowing certain asylum seekers to come and go from the RPC during set hours, on certain days, is also likely to be relied on by the Governments of Nauru and Australia as evidence that asylum seekers are not in fact detained in Nauru.

One reason for the reluctance of the Governments of Australia and Nauru to categorise the confinement of asylum seekers at the RPC as detention is that article 5(1) of the *Constitution of Nauru* prohibits the deprivation of personal liberty except in certain outlined exceptional situations. It is important to note that the Supreme Court of Nauru has found that ‘deprived of his personal liberty’, within the meaning of article 5(1) of the *Constitution of Nauru*, is interchangeable with the term ‘detention’.⁵⁵ That is, if the confinement of asylum seekers in Nauru constitutes detention, then the Governments of Australia and Nauru are constrained by the *Constitution of Nauru* in depriving asylum seekers of their liberty.

In *AG v Secretary of Justice*,⁵⁶ which tested the legality of immigration detention under the 2012 *MOU* between Australia and Nauru, the Supreme Court of Nauru found that individuals transferred to Nauru by Australia were in fact ‘deprived of their personal liberty’ within the meaning of article 5(1) of the *Constitution of Nauru*. As the Court reasoned:

there can be many restrictions on liberty and movement which will not amount to a deprivation of liberty, ie detention. The difference between deprivation of and restriction on liberty is one of degree not substance, and the task for the court is to assess into which category a particular case falls.⁵⁷

The restrictions on the liberty of the asylum seekers at the time of the Court’s hearing in 2013 were found by the Court to be of a degree that constituted deprivation of liberty or detention. Many of the asylum seekers could not return to their home countries because they feared persecution upon their return.⁵⁸ Furthermore, the Court found that the conditions of the visa, the name of the RPC and the possibility for excursions did not negate the fact that the asylum seekers were detained.⁵⁹ As such, the Court did not accept the arguments that had been put thus far by Australia and Nauru in their attempt to reject the categorisation of the RPC as a detention facility.

It therefore follows that the decision of the Supreme Court of Nauru in *AG v Secretary of Justice* is authority for the proposition that asylum seekers who are held at the RPC under the same conditions as those considered by the Nauruan Supreme Court in 2013 are detained. However, the decision preceded the recent

54 Ibid [48]–[49].

55 Ibid [40].

56 Ibid.

57 Ibid [41].

58 Ibid [49].

59 Ibid [54].

open centre arrangement and cannot, therefore, be relied on as authority for the proposition that asylum seekers who participate in the open centre arrangement are still in a situation that can be characterised as detention. Nevertheless, it can be strongly argued that like asylum seekers who are not provided with an opportunity to leave the RPC, asylum seekers participating in the open centre arrangement are also deprived of their liberty (or detained) within the meaning of article 5(1) of the *Constitution of Nauru*.

As the Supreme Court of Nauru has pointed out, '[t]he language of art 5(1) [of the *Constitution of Nauru*] bears similarity, in some respects close similarity, to art 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*'.⁶⁰ The European Court of Human Rights has held that the question of whether or not an individual is deprived of his or her liberty, within the meaning of article 5 of the *ECHR*, is a question of the 'degree or intensity, and not one of nature or substance' of the restrictions.⁶¹ That is, it is the cumulative impact of the restrictions that must be considered in determining whether or not an individual is detained.⁶²

The restrictions on the movement of asylum seekers in Nauru who have access to the open centre arrangement can be compared to the conditions tested in the leading judgment on the issue of what constitutes detention under article 5(1) of the *ECHR*, *Guzzardi v Italy*.⁶³ The case concerned a suspected member of the Italian Mafia, Mr Guzzardi, who in 1975 was removed from jail in Milan and taken to the island of Asinara where he was ordered to remain for three years. Mr Guzzardi could apply for authorisation to leave the island if he had good reasons. Any visits outside of Asinara were made with strict police supervision. Mr Guzzardi was permitted to work although he maintained that work was limited. He could be visited by members of his family who lived on the Italian mainland, and members of his family even lived with him for some of the period of his confinement.

The characterisation of Mr Guzzardi's confinement in Asinara as detention was disputed by Italy. The European Court of Human Rights accepted the Italian Government's reasoning that Mr Guzzardi's treatment was very different from 'classic detention in prison or strict arrest imposed on a serviceman'.⁶⁴ The Court found that '[d]eprivation of liberty may, however, take numerous other forms'.⁶⁵ After considering the number of restrictions placed upon Mr Guzzardi, the Court concluded:

60 Ibid [39]. See *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('*ECHR*').

61 *Amuur v France* (1996) 22 Eur Court HR (ser A) 533, 21 [42].

62 *Guzzardi v Italy* (1980) 3 Eur Court HR (ser A) 333, 30–1 [95].

63 (1980) 3 Eur Court HR (ser A) 333.

64 Ibid [95].

65 Ibid.

It is admittedly not possible to speak of ‘deprivation of liberty’ on the strength of any one of [the restrictions placed on Mr Guzzardi] taken individually, *but cumulatively and in combination* they certainly raise an issue of categorisation from the viewpoint of article 5 [of the *ECHR*] ... In certain respects the treatment complained of resembles detention in an ‘open prison’ or committal to a disciplinary unit.⁶⁶

Therefore, in combination, the restrictions set out above led the European Court of Human Rights to find that Mr Guzzardi had been subjected to deprivation of liberty.

Cumulatively and in combination, the restrictions placed on asylum seekers participating in the open centre arrangement at the RPC can likewise be seen to constitute deprivation of liberty under article 5(1) of the *ECHR*, and thus also under the analogous provision of article 5(1) of the *Constitution of Nauru*. Mr Guzzardi’s situation is similar in some respects to asylum seekers participating in the open centre arrangement. However, Asinara, an Italian island of 52 square kilometres, is considerably larger than the island of Nauru, which occupies a mere 21 square kilometres. Furthermore, unlike Mr Guzzardi, asylum seekers participating in the open centre arrangement cannot leave the island of Nauru;⁶⁷ cannot work; are much more limited in their contact with the outside world; and cannot be visited by family members from outside Nauru.

The confinement of asylum seekers to the RPC, or to the island of Nauru, should also be characterised as detention under international law. Detention is regulated under international human rights law by article 9 of the *ICCPR*.⁶⁸ The Human Rights Committee (‘HRC’) has stated that ‘[d]eprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement’.⁶⁹ Asylum seekers who do not participate in the open centre arrangement are clearly detained as their deprivation of liberty is severe and within a narrow space. This article now turns to the question of whether or not asylum seekers participating in the open centre arrangement are deprived of their liberty or detained within the meaning of article 9 of the *ICCPR*.

66 Ibid (emphasis added).

67 The only exception being that asylum seekers may be taken to Australia for medical treatment if appropriate health care cannot be provided in Nauru: Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Immigration and Border Protection Portfolio, Parliament of Australia, Canberra, 23 February 2015, 121 (Kate Pope, First Assistant Secretary, Community and Settlement Services, Immigration Status Resolution Group).

68 The extraterritorial application of the *ICCPR* to Australia, in the context of the confinement of asylum seekers to the RPC and potential violations of the *ICCPR*, is discussed in detail below in Part VI.

69 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, 112th sess, UN Doc CCPR/C/GC/35 (28 October 2014) [5]. This General Comment replaced Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons)*, 16th sess, UN Doc CCPR/C/GC/8 (30 June 1982).

The HRC has not clarified at what point restrictions of motion will be of such severity as to constitute deprivation of liberty. However, in *Celepli v Sweden*,⁷⁰ the HRC expressed the view that confinement of Mr Celepli to his home municipality of Västerhaninge, a town of approximately 9.32 square kilometres, which at that time had a population of 10 000 inhabitants, did not constitute 'deprivation of liberty, within the meaning of article 9 of the *Covenant*'.⁷¹ Mr Celepli was required to report to the police three times per week, and to seek permission before changing his employment or residence. In *Karker v France*,⁷² limitation of movement under a compulsory residence order to 15.6 square kilometres and later 117.07 square kilometres was also found not to constitute 'deprivation of liberty' for the purposes of article 9(1) of the *ICCPR*.⁷³ The HRC observed that the residency order

allowed [Mr Karker] to reside in a comparatively wide area. Moreover, the restrictions on Mr Karker's freedom of movement were examined by the domestic courts which, after reviewing all the evidence, held them to be necessary for reasons of national security.⁷⁴

The restrictions placed on asylum seekers participating in the open centre arrangement are considerably more severe than those that had been placed on Mr Celepli or Mr Karker. Asylum seekers who are permitted to leave the RPC are subject to a curfew, can only leave the centre three days per week, and are limited to the confines of Nauru. Unlike Mr Celepli, who was required to report his whereabouts three times per week, asylum seekers are required to account for their whereabouts on a daily basis. Significantly, Mr Celepli and Mr Karker were not forcibly taken to an island to which they had no connection, but rather their movements were confined to areas in which they were already residing.

Unfortunately, the HRC did not clarify, in the communications discussed above, what circumstances would constitute deprivation of liberty or detention. Therefore, while it can be argued that individuals in the situation of Mr Karker or Mr Celepli are not deprived of their liberty or detained, greater guidance is needed from the HRC to clarify under what circumstances an individual can be said to be detained pursuant to article 9 of the *ICCPR*. Nevertheless, this article argues that the much greater severity of the restrictions on asylum seekers in Nauru under the open centre arrangement (as compared to Mr Celepli and Mr Karker) means their situation can be characterised as detention under article 9 of the *ICCPR*.

This argument is supported by the *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland* in 2008, in which the HRC expressed concern about a control order regime under

70 51st sess, UN Doc CCPR/C/51/D/456/1991 (18 July 1994).

71 Ibid [5.3].

72 70th sess, UN Doc CCPR/C/70/D/833/1998 (26 October 2000).

73 Ibid [8.5].

74 Ibid [9.2].

the *Prevention of Terrorism Act 2005* (UK).⁷⁵ The HRC cited article 9 of the *ICCPR* (which regulates detention) rather than article 12(1) of the *ICCPR* (which regulates freedom of movement) as a provision of the *ICCPR* enlivened by the control orders. As such, the HRC suggested that the control orders could constitute detention because they included curfews of 16 hours. The HRC was unclear as to which other elements in the ‘wide range of restrictions’⁷⁶ under the *Prevention of Terrorism Act 2005* (UK) contributed to the characterisation of the restrictions under the *Prevention of Terrorism Act 2005* (UK) as detention. What the HRC’s statement does suggest, however, is that certain restrictions, including curfews, can be an element of detention under certain circumstances. Asylum seekers participating in the open centre arrangement also have a curfew of 16 hours. As such, while a direct comparison with the control orders under the *Prevention of Terrorism Act 2005* (UK) is not possible, the finding of the HRC gives weight to the proposition that the open centre arrangement would also constitute detention under article 9 of the *ICCPR*.

V PROTECTION AGAINST UNLAWFUL DEPRIVATION OF LIBERTY UNDER THE MUNICIPAL LAW OF NAURU

Having established that asylum seekers in Nauru are liable to be viewed as detained, including those participating in the open centre arrangement, the question arises as to the legality of this detention. This article will turn first to the legality of this detention under the municipal law of Nauru before considering the compliance of this detention with international law.

One exception to the prohibition against the deprivation of liberty provided under article 5(1)(h) of the *Constitution of Nauru* is in cases where detention is ‘for the purpose of preventing ... unlawful entry into Nauru, or for the purpose of effecting ... expulsion, extradition or other lawful removal from Nauru’.

While accepting that individuals transferred to Nauru by Australia were in fact deprived of their liberty within the meaning article 5(1) of the *Constitution of Nauru*, in *AG v Secretary of Justice*, the Supreme Court of Nauru found that the detention of asylum seekers was permitted under article 5(1)(h) of the *Constitution of Nauru*.⁷⁷ The Supreme Court of Nauru reasoned:

It never has been the intention of Nauru in granting visas to ... [asylum seekers] that their stay in Nauru will be other than temporary. In the *MOU* [between Nauru

75 Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, 93rd sess, UN Doc CCPR/C/GBR/CO/6 (30 July 2008).

76 Ibid [17].

77 This decision follows two previous decisions of the Supreme Court of Nauru: *Mahdi v Director of Police* [2003] NRSC 3; *Amiri v Director of Police* [2004] NRSC 1. The majority of the Australian High Court in *Ruhani v Director of Police (No 2)* (2005) 222 CLR 489 also accepted that asylum seekers were detained in Nauru but found that this detention was authorised by law.

and Australia signed 29 August 2012], clause 11, Australia agrees to make all efforts to ensure that transferees will depart Nauru in as short a time as is reasonably necessary for the implementation of the *MOU*.⁷⁸

In *AG v Secretary of Justice*, the Supreme Court of Nauru considered arrangements under the 2012 *MOU* which did not require the settlement of any refugees in Nauru. As such, all asylum seekers detained in the RPC at the time of the Court's judgment were to be removed from Nauru: either because they were found not to be refugees and were thus repatriated, or because they were to be resettled in a third country. However, under the 2013 *MOU* between Australia and Nauru, all asylum seekers found to be refugees are resettled in Nauru for up to five years, and at least some will remain in Nauru permanently (namely those who refuse to be resettled in Cambodia).

There is a very strong argument that refugees transferred to Nauru under the 2013 *MOU* between Australia and Nauru are now detained in contravention of the *Constitution of Nauru*, since the purpose of detention is no longer to effect their removal from Nauru. It is possible that some detainees who will be settled in Nauru may never be subject to expulsion or other lawful removal from Nauru and thus their stay is not 'temporary'.⁷⁹ The detention of individuals who will not 'depart Nauru'⁸⁰ is thus not justified on the ground that it *effects* their expulsion, extradition or other lawful removal from the country. As such, the detention of such individuals is no longer permitted under article 5(1)(h), and is therefore prohibited under article 5(1) of the *Constitution of Nauru*.

It should also be noted that the detention of refugees cannot be justified under the first limb of the exception provided by article 5(1)(h) of the *Constitution of Nauru*. That is, it cannot be argued that detention is 'for the purpose of preventing [the] unlawful entry into Nauru' of detainees. This is because detainees are lawfully transferred to Nauru by the Australian Government against their will under the 2013 *MOU* between the two countries. Moreover, clause 16 of the 2013 *MOU* provides that '[t]he Republic of Nauru undertakes to enable Transferees, including those who it determines are Refugees, to be lawful during their stay in Nauru'. The provision of a visa to all asylum seekers transferred to Nauru ensures that they remain lawfully on the island.

The possibility that some refugees may be ultimately resettled in Cambodia is largely immaterial for the purposes of determining the constitutional validity of detention. This is because under current arrangements between Australia and Cambodia, refugees released from detention will be first released into the Nauruan community on a temporary settlement visa before being transferred to Cambodia. The detention of such refugees in Nauru is not to effect their removal but to provide them with a means of remaining in Nauru for a period of time. As

78 *AG v Secretary of Justice* [2013] NRSC 10, [72].

79 *Ibid.*

80 *Ibid.*

the name of the visa suggests, the refugees will be ‘settled’, albeit only for a period of up to five years.

It should likewise be noted that the above analysis is also applicable to the prior detention of the 13 unaccompanied children who had been released into the Nauruan community as of February 2015 (some of whom may not be refugees).⁸¹ The prior detention of this group is likely to be unlawful because their detention was not for the purpose of effecting their removal from Nauru. As is evident from the fact that they are living in the Nauruan community, the prior detention of the children was for the purpose of their settlement in the country (even if only temporarily for some).

A Prolonged Detention

A second challenge to the constitutional validity of immigration detention in Nauru is that prolonged detention renders detention unlawful.⁸² In *AG v Secretary of Justice*, the Supreme Court of Nauru found interesting the appellant’s argument that delays in processing render detention inconsistent with the *Constitution of Nauru*, stating:

long and unreasonable delay by the respondent in processing their claims and in arranging their removal, for example because of compliance with Australia’s ‘no advantage’ policy, will render their detention ‘not authorised by law’ because in those circumstance[s] it is arbitrary and beyond the contemplation of the constitutional exception.⁸³

A challenge to the constitutional validity of detention on the grounds of prolonged delays may render unlawful the detention of both refugees (who will be settled in Nauru) and asylum seekers whose asylum claims will be rejected (and who will be removed from Nauru). Whether or not prolonged delays have rendered detention unlawful is an empirical question. In June 2013, approximately nine months after the transfer of the first asylum seekers to Nauru, the Supreme Court of Nauru found that the point at which detention becomes arbitrary because of prolonged delays had not yet been reached, but left the door open for such an argument should excessive delays occur.⁸⁴

81 While 11 of the children were found to be refugees, two of the 13 had not had their status determined: Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Immigration and Border Protection Portfolio, Parliament of Australia, Canberra, 23 February 2015, 68 (Kate Pope, First Assistant Secretary, Community and Settlement Services, Immigration Status Resolution Group).

82 For a consideration of the prolonged administrative custody of immigrants and asylum seekers by the UN Working Group on Arbitrary Detention, see UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 56th sess, UN Doc E/CN4/2000/4/ (28 December 1999) annex II (‘*Deliberation No 5*’). Under principle 7 of *Deliberation No 5*, the Working Group states that ‘[a] maximum period should be set by law and the custody may in no case be unlimited or excessive in length’.

83 *AG v Secretary of Justice* [2013] NRSC 10, [79].

84 *Ibid.*

It is arguable that detention has now become unlawful because of prolonged delays. Some asylum seekers have been detained for approximately 2.5 years or 900 days as of March 2015,⁸⁵ and it is not known when they will be released from detention. It is strongly arguable that 2.5 years is a prolonged period of detention and is evidence of unreasonable delays in processing, in contravention of the *Constitution of Nauru*.

Whether or not other asylum seekers have been subject to delays that can be deemed to render their detention unconstitutional is difficult to determine in the absence of more information. Neither the Australian nor Nauruan Government provides statistics regarding the length of detention for individual asylum seekers. The length of detention is particularly difficult to calculate because of the fluctuating numbers of asylum seekers at the RPC. Nevertheless, it remains arguable that asylum seekers (regardless of whether or not they are ultimately found to be refugees) are detained in contravention of the *Constitution of Nauru* if it can be established that they have been subject to unreasonable delays in the processing of their claims and their release from detention.

VI AUSTRALIA'S OBLIGATIONS UNDER THE *ICCPR*

In addition to the unconstitutionality of detention under the municipal law of Nauru, the detention of asylum seekers in Nauru may also violate obligations under international human rights law, specifically the *ICCPR* and the *CRC*, which this article will address in turn.

Nauru has signed but has not ratified the *ICCPR* and is thus not bound by its provisions,⁸⁶ while Australia has both signed and ratified the *ICCPR*.⁸⁷ As such, two preliminary questions must be answered before determining if Australia has violated any of its obligations under the *ICCPR*. First, does the *ICCPR* apply extraterritorially? Secondly, does Australia's involvement in the detention of asylum seekers in the RPC satisfy the conditions needed to trigger obligations to detainees under the *ICCPR*?

Turning first to the extraterritorial application of the *ICCPR*, article 2(1) of the *ICCPR* provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present *Covenant*, without distinction of any kind, such as race, colour, sex,

85 Namely, those individuals who were among the first group to be transferred to Nauru in September 2012 were not in the cohort to be transferred back to Australia in July 2013 (because of their involvement in the unrest at the centre), and were not in the small cohort to have received a decision on their claim.

86 Nauru signed the *ICCPR* on 12 November 2001.

87 Australia signed the *ICCPR* on 18 December 1972 and ratified the *ICCPR* on 13 August 1980.

language, religion, political or other opinion, national or social origin, property, birth or other status.⁸⁸

The term ‘and’ in the phrase ‘all individuals within its territory and subject to its jurisdiction’ in article 2(1) of the *ICCPR* should be interpreted as providing an alternative trigger for the operation of article 2(1), rather than providing an additional requirement for the operation of article 2(1).⁸⁹

The HRC supports the reading that the *ICCPR* applies where a state party exercises jurisdiction, even outside the state party’s territory. The HRC first suggested that the *ICCPR* could apply outside the territorial boundaries of a state party in three communications concerning the exercise of jurisdiction by Uruguay over Uruguayan citizens in foreign territory in the 1980s,⁹⁰ and reaffirmed its position in *General Comment No 31* where it stated:

the enjoyment of *Covenant* rights is not limited to citizens of State Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory *or* subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.⁹¹

The view that the *ICCPR* applies wherever a state party exercises jurisdiction is also shared by the International Court of Justice.⁹² It would thus follow that Australia is bound by its obligations under the *ICCPR* in respect to asylum seekers detained in Nauru if it exercises ‘jurisdiction’ at the RPC.

88 *ICCPR* art 2(1) (emphasis added).

89 See Sigrun I Skogly, ‘Extraterritoriality: Universal Human Rights without Universal Obligations?’ in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, 2010) 92–3; Nigel Rodley, ‘The Extraterritorial Reach and Applicability in Armed Conflict of the *International Covenant on Civil and Political Rights*: A Rejoinder to Dennis and Surena’ (2009) 5 *European Human Rights Law Review* 628; Dominic McGoldrick, ‘Extraterritorial Application of the *International Covenant on Civil and Political Rights*’ in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 41; Theodor Meron, ‘Extraterritoriality of Human Rights Treaties’ (1995) 89 *American Journal of International Law* 78–82; Thomas Buergenthal, ‘To Respect and To Ensure: State Obligations and Permissible Derogations’ in Louis Henkin (ed), *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 72.

90 See Human Rights Committee, *Views: Communication No 106/1981*, 18th sess, UN Doc CCPR/C/18/D/106/1981 (31 March 1983) (‘*Montero v Uruguay*’); Human Rights Committee, *Views: Communication No 52/1979*, 13th sess, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) (‘*Burgos v Uruguay*’); Human Rights Committee, *Views: Communication No 56/1979*, 13th sess, UN Doc CCPR/C/13/D/56/1979 (29 July 1981) (‘*Casariago v Uruguay*’).

91 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 4 [10] (emphasis added).

92 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 242–3 [216].

The question of whether or not Australia exercises 'jurisdiction' at the RPC can be answered by examining Australia's role in the detention of asylum seekers in Nauru. The 2013 *MOU* between Australia and Nauru clearly identifies Australia as the party responsible for the transfer of individuals to be detained in Nauru.⁹³ The detention of asylum seekers in Nauru is paid for entirely by Australia and it is Australia, not Nauru, that has contracted service providers to operate the detention facility in Nauru. Significantly, Australia maintains a visible and active presence at the RPC at all times. In the words of the UNHCR:

it is clear that Australia has retained a high degree of control and direction in almost all aspects of the bilateral transfer arrangements. The Government of Australia funds the refugee status determination process which takes place in Nauru, seconds Australian immigration officials to undertake the processing and effectively controls most operational management issues.⁹⁴

It is thus clear that Australia has 'effective control' in the RPC and exercises jurisdiction in the detention facility, which triggers Australia's obligations under the *ICCPR* to refrain from arbitrary detention and to provide detainees with a right of review.⁹⁵

A Protection against Arbitrary Detention under the *ICCPR*

Arbitrary detention is prohibited under article 9(1) of the *ICCPR*. The HRC stated in *A v Australia* that there is no basis to argue that 'it is *per se* arbitrary to detain individuals requesting asylum'.⁹⁶ However, the HRC has expressed the view that 'detention should not continue beyond the period for which the State can provide appropriate justification'.⁹⁷ The HRC has also stated that 'remand in custody could be considered arbitrary if it is not necessary in all the

93 Republic of Nauru and Commonwealth of Australia, *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru and Related Issues* (Intergovernmental Agreement, 3 August 2013) cl 7 provides: 'The Commonwealth of Australia may Transfer and the Republic of Nauru will accept Transferees from Australia under this *MOU*'.

94 UNHCR Regional Representation, above n 9, 23 [128].

95 For an analysis of Australia's exercise of jurisdiction in Indonesia and PNG, see Savitri Taylor, 'Australia's Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but No Responsibility?' (2010) 33 *University of New South Wales Law Journal* 337.

96 Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) 23 [9.3] ('*A v Australia*') (emphasis in original).

97 *Ibid* 23 [9.4].

circumstances of the case'⁹⁸ and when factors necessitating detention are not 'particular to the individual'.⁹⁹

As with Australia's policy of mandatory immigration detention in Australian territory, which has been found by the HRC to be in violation of article 9(1) of the *ICCPR*,¹⁰⁰ all asylum seekers are subject to mandatory detention after being transferred to Nauru. No assessment is made regarding the individual circumstances of any detainee and no alternatives are considered. This detention only comes to an end if the detainees are repatriated, or resettled in Nauru or a third country. Australia and Nauru cannot argue that this detention is justified on the grounds that it is necessary for processing, checks and availability for removal, because, as established in *A v Australia*, these reasons are not particular to the detention of every asylum seeker. In other words, at least some asylum seekers currently detained in Nauru could be released from their detention without affecting processing, checks or availability for removal. As such, the detention is not 'necessary in all the circumstances of the case'.¹⁰¹ It therefore follows that asylum seekers are arbitrarily detained at the RPC and Australia is acting in violation of its obligations under article 9(1) of the *ICCPR*.

B Right of Review under the *ICCPR*

Closely related to article 9(1) of the *ICCPR* is article 9(4), which provides:

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

The HRC has interpreted article 9(4) to mean that a detainee must have a right to appeal his or her detention in a court to determine the legality of the

98 Ibid 23 [9.2]. See also Human Rights Committee, *Views: Communication No 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) 13 [7.2] ('*Shafiq v Australia*').

99 *A v Australia*, UN Doc CCPR/C/59/D/560/1993, 23 [9.4]. The requirement for the detention to be particular to the individual has been reiterated in other communications concerning Australia's policy of mandatory immigration detention in Australian territory. See, eg, Human Rights Committee, *Views: Communication No 1442/2005*, 97th sess, UN Doc CCPR/C/97/D/1442/2005 (23 November 2009) ('*Kwok v Australia*').

100 *A v Australia*, UN Doc CCPR/C/59/D/560/1993; Human Rights Committee, *Views: Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('*C v Australia*'); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*'); Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (29 October 2003) ('*Bakhtiyari v Australia*'); Human Rights Committee, *Views: Communication No 1050/2002*, 87th sess, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006) ('*D & E v Australia*'); *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004; Human Rights Committee, *Views: Communications Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (11 September 2007) ('*Shams v Australia*'); *Kwok v Australia*, UN Doc CCPR/C/97/D/1442/2005.

101 *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004, 13 [7.2]. See also *A v Australia*, UN Doc CCPR/C/59/D/560/1993, 23 [9.2].

detention and the court must be empowered to order the release of the detainee if there is a violation of article 9(1) of the *ICCPR*.¹⁰² The HRC found that review of detention which was 'limited to mere compliance of the detention with domestic law'¹⁰³ did not satisfy the requirements under article 9(4) of the *ICCPR*. In *A v Australia*, the HRC expressed the view that:

what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the *Covenant*.¹⁰⁴

As such, Australia was found to be in violation of article 9(4) of the *ICCPR* in its detention of an asylum seeker in Australian territory, because the right to question the legality of detention under municipal law was merely formal and not real in its effect and the courts were not empowered to release the asylum seeker from immigration detention.¹⁰⁵

Asylum seekers detained in Nauru do have a right to bring habeas corpus proceedings in Nauru and to be released from detention if their detention is found to be unlawful.¹⁰⁶ However, this right is 'limited to mere compliance of the detention with domestic law'.¹⁰⁷ As argued above, detention of asylum seekers in Nauru is in violation of Australia's obligations under article 9(1) of the *ICCPR*; yet no court in either Australia or Nauru is empowered to release detainees because of violations of obligations under the *ICCPR*. As such, the right of review enjoyed by asylum seekers in Nauru is merely formal, placing Australia in violation of article 9(4) of the *ICCPR*.

VII DETENTION UNDER THE CRC

In addition to the *ICCPR*, the *CRC* also prohibits the arbitrary detention of children. Nauru acceded to the *CRC* in July 1994 and is thus bound by the provisions of the *CRC* in its dealings with children in its jurisdiction, including in

102 *A v Australia*, UN Doc CCPR/C/59/D/560/1993, 24 [9.5].

103 Ibid.

104 Ibid.

105 Australia's immigration detention regime has also been found to be in violation of art 9(4) of the *ICCPR* in a number of other decisions: see, eg, *C v Australia*, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001, 12–13 [7.2]; *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002, 18 [9.4]–[9.5]; *Shams v Australia*, UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004, 14 [7.3]; *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004, 14 [7.4].

106 *Criminal Procedure Act 1972* (Nauru) s 213(1); *Customs and Adopted Laws Act 1971* (Nauru) s 4(1).

107 *A v Australia*, UN Doc CCPR/C/59/D/560/1993, 24 [9.5].

its dealings with asylum seeker children.¹⁰⁸ The Australian Government ratified the *CRC* in December 1990. As with the *ICCPR*, Australia's exercise of jurisdiction at the RPC triggers extraterritorial obligations under the *CRC* to asylum seeker children. Article 2(1) of the *CRC* provides:

States Parties shall respect and ensure the rights set forth in the present *Convention* to each child *within their jurisdiction* without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.¹⁰⁹

That is, in accordance with article 2(1) of the *CRC*, a state is obliged to 'respect and ensure' the rights enumerated by the *CRC* of all children in its 'jurisdiction' rather than simply in its territory. Furthermore, Australia is responsible for the asylum seeker children despite the fact that they are not Australian citizens because article 2(1) of the *CRC* applies regardless of nationality or other status.

Article 37(b) of the *CRC* provides: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily'. The *travaux préparatoires* of the *CRC* confirm that the prohibition of arbitrary detention under article 37(b) of the *CRC* is based on article 9(1) of the *ICCPR*,¹¹⁰ discussed above. As detention of asylum seekers in Nauru is arbitrary, in contravention of article 9(1) of the *ICCPR*, it follows that Australia and Nauru are also in violation of article 37(b) of the *CRC*.

Furthermore, even when immigration detention is not arbitrary, article 37(b) of the *CRC* prohibits its use in the case of children except 'as a measure of last resort and for the shortest appropriate period of time'. The Committee on the Rights of the Child has explained:

The use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37(b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child's right to development is fully respected and ensured.¹¹¹

The detention of asylum seeker children in Nauru is not used as a last resort, nor is it for the shortest appropriate period of time, placing Australia and Nauru in further violation of their obligations under article 37(b) of the *CRC*. The

108 It should be noted that Nauru has not submitted any reports to the Committee on the Rights of the Child: see Natalie Baird, 'To Ratify or Not To Ratify? An Assessment of the Case for Ratification of International Human Rights Treaties in the Pacific' (2011) 12 *Melbourne Journal of International Law* 249.

109 *CRC* art 2(1) (emphasis added).

110 Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Kluwer Law International, 1999) 629.

111 Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) 5 [11].

AHRC, in its 2014 report on children in immigration detention,¹¹² stated that 'the inevitable and foreseeable consequence of Australia's transfer of children to Nauru is that they would be detained in breach of article 37(b) of the *Convention on the Rights of the Child*'.¹¹³

VIII CONCLUSION

Australia wields significant influence over its former protectorate of Nauru, which is a very small, economically struggling island state with a mere population of 10 000.¹¹⁴ The two nations are so closely bound that there have been several proposals to resettle the population of Nauru in Australia.¹¹⁵

As the Australian Government acknowledges, 'Nauru's economy faces significant constraints' including in its ability 'to create jobs and promote growth for an expanding population'.¹¹⁶ Australian geoscientist Professor John Connell goes further, stating:

there is every indication that the state [of Nauru] has comprehensively failed and that different kinds of external intervention are required ... [o]ver the past decade Nauru has moved from considerable affluence, based on the export of phosphate, to penury, where public service salaries cannot be paid and the basic functions of the state have collapsed.¹¹⁷

Following the exhaustion of phosphate reserves, Nauru has resorted to what Orlow refers to as 'selling sovereignty'.¹¹⁸ Orlow's analysis concerns tax havens and the ability of small nations, such as Nauru, to raise revenue by using their

112 Australian Human Rights Commission, above n 37. The Report follows a similar inquiry by the Commission (then named the Human Rights and Equal Opportunity Commission) in 2004 which also found violations of the *CRC* in its inspection of detention facilities in Australian territory including breaches of art 37(b): Human Rights and Equal Opportunity Commission, *A Last Resort? The Report of the National Inquiry into Children in Immigration Detention* (April 2004).

113 Australian Human Rights Commission, above n 37, 36, 200. See generally: at ch 12. The legality of the transfer of asylum seekers from Australia to Nauru and the conditions of detention in the RPC are beyond the scope of this article. However, it is interesting to note that the AHRC found Australia to be in violation of art 3(1) of the *CRC* in its failure to consider whether the transfer of asylum seekers to Nauru was in the best interest of children. In addition, the AHRC had serious concerns that the conditions in which children are detained in Nauru place Australia in violation of arts 16(1), 19(1), 20(1), 24(1), 27(1), 27(3), 28, 31, 34 and 37(a) of the *CRC*.

114 Nauru is the smallest republic in the world: Kathy McLeish, 'Nauru: The World's Smallest Republic', *ABC News* (online), 23 October 2013 <<http://www.abc.net.au/news/2013-10-23/nauru-worlds-smallest-republic/4983548>>.

115 Gil Marvel Tabucanon and Brian Opeskin, 'The Resettlement of Nauruans in Australia' (2011) 46 *Journal of Pacific History* 337.

116 Department of Foreign Affairs and Trade, Australian Government, *Nauru Country Brief* <<http://www.dfat.gov.au/geo/nauru/Pages/nauru-country-brief.aspx>>.

117 John Connell, 'Nauru: The First Failed Pacific State?' (2006) 95 *Round Table* 47, 47.

118 Daniel Orlow, 'Comment: Of Nations Small: The Small State in International Law' (1995) 9 *Temple International and Comparative Law Journal* 115.

sovereign status to provide services to money launderers. Nauru was indeed engaged in such a practice but later abandoned its tax haven status because of the threat of international financial sanctions.¹¹⁹

The concept of ‘selling sovereignty’ can also be applied to Nauru’s decision in 2001 to participate in Australia’s ‘Pacific Solution’ in exchange for financial support from Australia,¹²⁰ and the reopening of its facility for Australia’s asylum seekers in 2012.¹²¹ This is because Australia’s interest in Nauru stems from Nauru’s status as an independent nation. Nauru’s sovereignty enables Australia to claim it is Nauru – not Australia – that is responsible for asylum seekers and thus deflect criticism of its asylum policies.

However, the role of Nauru in Australia’s border protection policies is more problematic for Australia than the Australian Government would like to acknowledge. Contrary to the claims of both Australia and Nauru, asylum seekers are in fact detained in Nauru. Although the open centre arrangement announced in February 2015 permits some asylum seekers to move freely around the island of Nauru between 9.00am and 5.00pm for three days per week, their situation can still be characterised as detention due to the cumulative degree and intensity of the restrictions imposed upon them (including curfews). The 2013 *MOU* between Australia and Nauru provides for some refugees to be resettled in Nauru, although this may only be a temporary settlement for those who voluntarily elect to be resettled permanently in Cambodia. Regardless of how long refugees are in the Nauruan community, the fact that their prior detention did not effect their expulsion from the country is likely to render that detention unlawful under the *Constitution of Nauru*. Additionally, cases where asylum

119 Anthony B van Fossen, ‘Money Laundering, Global Financial Instability, and Tax Havens in the Pacific Islands’ (2003) 15 *Contemporary Pacific* 237. See also Reuters, ‘Nauru Struck Off Tax Haven Blacklist’, *ABC News* (online), 13 December 2003 <<http://www.abc.net.au/news/2003-12-13/nauru-struck-off-tax-haven-blacklist/105070>>.

120 Nauru was granted aid packages of \$41.5 million for 2001–03 and \$22.5 million for 2003–05. Nauru had been scheduled to receive a mere \$3.4 million in aid from Australia in 2001–02: Oxfam Community Aid Abroad, *Adrift in the Pacific: The Implications of Australia’s Pacific Refugee Solution* (2002).

121 Australia’s aid expenditure to Nauru in 2012–13 was \$31.6 million: Department of Foreign Affairs and Trade, Australian Government, *Nauru Aid Program Performance Report 2012–13* (Departmental Report, 4 February 2014) 4 <<http://dfat.gov.au/about-us/publications/Documents/nauru-appr-2012-13.pdf>>. The expenditure in 2013–14 was \$22.2 million: Department of Foreign Affairs and Trade, Australian Government, *Overview of Australia’s Aid Program to Nauru* <<http://dfat.gov.au/geo/nauru/development-assistance/pages/development-assistance-in-nauru.aspx>>. This did not include the Australian regional processing visa fee (\$3000 per asylum seeker for three months) which is paid by the Australian Government: AAP, ‘Nauru’s \$1000 a Month Visa Charge for Asylum Seekers’, *The Australian* (online), 26 October 2012 <<http://www.theaustralian.com.au/news/latest-news/naurus-1000-a-month-visa-charge-for-asylum-seekers/story-fn3dxity-1226503593247>>. The aid expenditure in Nauru in the 2014–15 period is expected to be \$27.1 million: Australian Council for International Development, *ACFID Federal Budget Analysis 2014–2015* (15 May 2014) <<http://www.acfid.asn.au/resources-publications/files/acfid-budget-analysis-2014-15>>. The detention centre in Nauru is also the second largest employer on Nauru after the Nauruan Government: Scott Morrison, Minister for Immigration and Border Protection, ‘Operation Sovereign Borders Update’ (Press Conference, 11 October 2013).

seekers experience long and unreasonable delays in the processing of their claims, and thus in their release from detention, may also render the detention unconstitutional.

Furthermore, Australia cannot avoid responsibility under international law for the detention of asylum seekers in Nauru's RPC simply because this detention takes place in foreign territory. The exercise of jurisdiction by Australia in the RPC triggers Australia's obligations under the *ICCPR*, and Australia is failing to meet some of these obligations to asylum seekers detained in Nauru. As with Australia's policy of mandatory immigration detention in Australian territory, immigration detention in Nauru is arbitrary and does not offer detainees the right to have their detention reviewed, placing Australia in violation of articles 9(1) and 9(4) of the *ICCPR*. Furthermore, the detention of children in Nauru places Australia and Nauru in violation of article 37(b) of the *CRC*.

It is true that the detention of asylum seekers in Nauru could be rendered consistent with the *Constitution of Nauru* by accelerating processing to avoid unreasonable delays and reverting to the provisions of the previous 2012 *MOU* between Australia and Nauru that did not permit any refugees to settle in Nauru – not even temporarily. However, this would do nothing to address Australia's violations of articles 9(1) and 9(4) of the *ICCPR* or the violation of article 37(b) of the *CRC* by both Nauru and Australia.

To ensure that Australia and Nauru are not in violation of the *Constitution of Nauru*, the *ICCPR* or the *CRC*, the two countries must cease the arbitrary detention of asylum seekers at the RPC and ensure that the detention of children is only used as a last resort and for the shortest appropriate period. This is best achieved by stopping the transfer of asylum seekers to Nauru, releasing asylum seekers into the Australian community and resettling refugees in Australia.

The policy of resettling refugees in Nauru either permanently or for up to five years is likely to render the prior detention of asylum seekers at the RPC unconstitutional. Yet this is not the only reason that Australia, rather than Nauru, is the most appropriate place for resettling these refugees. If even half of the 802 asylum seekers detained in Nauru in January 2015 are found to be refugees, and join the approximately 500 refugees already released into the Nauruan community, Nauru will host 90 refugees per 1000 inhabitants.¹²² This figure would not include any other asylum seekers who may be transferred to Nauru in the future and found to be refugees.¹²³ In contrast, Australia currently hosts 1.3 refugees per 1000 inhabitants.¹²⁴ Australia is in a far better position to support

122 Of the asylum seekers processed in the first group of detainees in Nauru, 65 per cent were found to be refugees, although the numbers processed were small and may not have been representative of the larger group: Morrison, 'Operation Sovereign Borders Update', above n 121.

123 As a point of comparison, Jordan hosted the largest number of refugees per population in 2012 with 49 refugees per 1000 inhabitants: UNHCR, *Asylum Trends 2012: Levels and Trends in Industrialized Countries* (Report, 2012) <<http://www.tagesschau.de/ausland/unhcr108.pdf>>.

124 Ibid.

and absorb refugees who have sought its protection as it has a GDP that is 21 048 times greater than that of Nauru,¹²⁵ and a population that is approximately 22 606 times larger than that of Nauru.¹²⁶

To continue the detention of asylum seekers in Nauru is to prolong an unlawful practice that will cause increasing harm to a vulnerable group. Australia and Nauru cannot continue to pretend that the RPC in Nauru is anything other than a detention facility, and Australia cannot wash its hands of legal responsibility for the detainees, since it exercises jurisdiction at the centre. The detention of asylum seekers in Nauru contravenes both the municipal law of Nauru and the international obligations of Australia and Nauru.

125 Nauru's GDP in 2011 was US\$72 million, while Australia's GDP in the same period was US\$1 515 468 million: Department of Economic and Social Affairs, United Nations, *World Statistics Pocketbook 2013 Edition* (Statistics Pocketbook, Series V No 3, 2013) <http://unstats.un.org/unsd/pocketbook/World_Statistics_Pocketbook_2013_edition.pdf>.

126 Ibid.