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## Europe and extraterritorial asylum

Heijer, M. den

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## 7 | External Processing

### 7.1 INTRODUCTION

The relocation of asylum-seekers to an external processing facility for the determination of their status can be regarded as the culminating idea of external migration control. By locating protection and asylum processing outside the state of refuge, policies of external reception represent a fundamental shift from the traditional paradigm that asylum is granted inside the state's territory. Instead, asylum-seekers are granted a temporary safe haven in a foreign location, allowing for the determination of their status and the arrangement of more durable solutions. Those found eligible for protection may either be resettled into the state of refuge or are removed to a safe third country. Others, it is assumed, ought to be repatriated to their country of origin. The rationales for external processing may consist of discouraging abuse of territorial protection regimes, of avoiding legal obligations pertaining to those who present themselves at the state's border, of the provision of a temporary safe haven until the circumstances in the country of origin have changed, or to reduce costs in the reception of asylum-seekers.<sup>1</sup> External processing is further perceived as the ultimate means of preserving the state's sovereign prerogative to control the entrance of aliens. Or, as Australian Prime Minister Howard stated in support of Australia's Pacific Strategy: 'We will decide who comes to this country and the circumstances in which they come.'<sup>2</sup>

Within the refugee advocacy, the external processing and protection of refugees has raised a multitude of concerns, especially as regards the use of detention as a necessary auxiliary instrument and the lack of safeguards against the onward removal to potentially unsafe countries.<sup>3</sup> On a more fundamental

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1 United Kingdom Home Office, 'New International Approaches to Asylum Processing and Protection', reproduced in: House of Lords European Union Committee – Eleventh Report, 'Handling EU asylum claims: new approaches examined', 30 April 2004, Appendix 5 (hereafter 'A New Vision for Refugees'); K.F. Afeef, 'The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific', Oxford: Refugees Studies Centre Working Paper No. 36, October 2006.

2 *ABC Lateline* 21 November 2001, 'Liberals accused of trying to rewrite history'.

3 Amnesty International, 'Australia/Pacific: The 'Pacific Solution' – Offending Human Dignity', 26 August 2002, AI Index: ASA 12/009/2002; Amnesty International, 'Unlawful and Unworkable: Extraterritorial Processing of Asylum Claims', 17 June 2003, AI Index: IOR 61/004/2003; Human Rights Watch, 'An Unjust 'Vision' for Europe's Refugees' (Briefing

note, it is feared that schemes of external protection may render refugees 'beyond the domain of justice' and create 'rights-free zones' where neither domestic or international legal obligations apply.<sup>4</sup> The danger of the coming into being of a lawless area is seen to be augmented by the remote location of external facilities, making the processing less visible, transparent and accessible to public scrutiny.<sup>5</sup>

But, scholars have also submitted that states are not as such barred under international law from conceiving creative protection alternatives.<sup>6</sup> And in line with UNHCR's strategy of enhancing protection capacities in regions of origin, some academics have welcomed regional protection options as providing safe alternatives to unsafe routes of escape and as contributing to lasting solutions for the overwhelming majority of refugees who are not able to flee beyond their own region.<sup>7</sup> A variation to this argument is that the establishment of processing or reception centres in transit countries could provide a viable alternative for the protection of refugees who are refused further travel in the course of pre-border enforcement measures, including for those who are subjected to checking procedures at foreign airports or those who are interdicted at sea, as discussed in chapters 5 and 6.

External processing can take a variety of forms. In general, a distinction can be made between protection in regions of origin (or regional protection programmes<sup>8</sup>) and the external processing of asylum-seekers in transit countries. The former sees primarily to the enhancement of protection capacities in regions of origin, by increasing the capacities of state actors, non-state actors and international organisations as the UNHCR; by contributing to resettlement;

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Paper), 17 June 2003; Human Rights Watch, 'Not For Export': Why the International Community should Reject Australia's Refugee Policies' (Briefing Paper), September 2002.

4 G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', 5 *EJML* (2003), p. 338; H.H. Koh, 'America's Offshore Refugee Camps', 29 *University of Richmond Law Review* (1994), p. 141.

5 Australian Human Rights Commission, '2009 Immigration detention and offshore processing on Christmas Island' (Report), 2009, part C. introduction.

6 J.C. Hathaway, 'The False Panacea of Offshore Deterrence', 26 *Forced Migration Review* (2006), p. 56-57; G.S. Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', in: S. Blay, J. Burn and P. Keyzer (eds), *Offshore Processing of Asylum-seekers: The Search for Legitimate Parameters*, Broadway: Halstead Press (2008), p. 40. Also see UNHCR, 'Migration Amendment (Designated Unauthorised Arrivals) Bill. Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee', 22 May 2006, para. 16.

7 Ibid; Also see N. El-Enany, 'Who is the New European Refugee?', LSE Legal Studies Working Paper No. 19/2007, December 2007, p. 1-2.

8 See extensively chapter 5.2.3.

and by contributing to prospects of local integration.<sup>9</sup> It has also been suggested that regional protection areas could be used for the return of failed asylum-seekers.<sup>10</sup> The external processing in transit countries is generally proposed as an alternative to reception within the state of refuge; as a location where temporary protection can be provided; where claims are processed; and from where resettlement or repatriation can be arranged.

In view of the fact that protection programmes in regions of origin remain scarcely developed and are often not proposed as entailing the direct involvement of EU Member States nor the explicit restriction of rights of migrants in the sphere of entry and residence,<sup>11</sup> the current chapter deals only with programmes of external processing involving the interception and transfer of asylum-seekers and their subsequent status determination and resettlement or repatriation. In the absence of presently functioning European policies of external processing, the chapter will take as its background the two most pertinent non-European experiences of external processing: the programmes developed by the governments of Australia and the United States. These non-European precedents are then transposed into the European legal framework, by assessing to what extent those programmes correspond with the human rights norms binding the EU Member States. From this assessment, conclusions are drawn as to the legal feasibility of the possible future creation of programmes of external processing in the European context.

Although the idea of external processing has especially attracted attention in refugee law discourse, the material focus of the chapter extends beyond the typical rights associated with refugees. Indeed, programmes for the external processing of asylum-seekers may or may not increase a risk of *refoulement*. In itself, the very decision to institute a policy of external processing constitutes a recognition, in law or as a matter of policy, that rights of refugees should be respected and that, to that end, an assessment of the protection status of claimants should be made before a decision on resettlement or repatriation is taken. It would follow that external processing not necessarily constitutes an affront to international refugee law. This conclusion is subscribed by several authors who, commenting upon specific aspects of the past US and Australian offshore policies, have observed that the operations paid due respect for the prohibition of *refoulement*.<sup>12</sup>

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9 A New Vision for Refugees, para. 1; European Commission Communication, 'On the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: "Improving Access to Durable Solutions"', 4 June 2004, COM(2004)410 final.

10 A New Vision for Refugees, para. 1 (iv).

11 See, in the EU context, chapter 5.2.3.

12 C.M.J. Bostock, 'The International Legal Obligations owed to the Asylum-seekers on the MV Tampa', 14 *IJRL* (2002), p. 288; E. Willheim, 'MV Tampa: The Australian Response', 15 *IJRL* (2003), p. 172-176.

This does however not diminish the validity of concerns raised by others on alleged non-conformity of the US and Australian offshore programmes with the prohibition of *refoulement*.<sup>13</sup> These concerns however, do not appear to touch upon the concept of external processing as such, but rather originate from a lack of guarantees accompanying the external process, rendering it impossible, for example, to challenge decisions on the transfer to an offshore facility, status determination, or eventual removal from the facility.

In taking the US and American policies as background, the present chapter takes a more holistic perspective on the phenomenon of external processing. It focuses not on the detailed execution of the policies and their conformity with the wide variety of human rights which may indeed be at stake. Rather, it examines the legal validity of the two arguably most intrinsic components of external processing: that of both *procedurally* and *physically* containing a specific group of migrants. Within this analysis, the question of possible *refoulement* is taken as part of the broader issue of granting unauthorized arrivals access to a system of substantive and procedural safeguards capable of ensuring human rights and guaranteeing against the arbitrary exercise of state power. Under the question of *physical containment*, the general issue arises whether it is permissible to mandatorily and systematically detain a specific category of migrants. This question not only involves the legality of external detention as an instrument of migration policy, but also the cognate issues of terminating detention and the provision of prospects for detained persons in the sphere of entry, resettlement or repatriation.

The chapter submits that the physical and procedural ‘containment’ of asylum-seekers raises a number of key human rights issues which have not been satisfactorily addressed in the Australian and United States’ offshore processing programmes. Apart from a system which does not secure essential requirements of the rule of law (especially obstacles in the sphere of judicial review and an insufficient level of guarantees against arbitrary human rights interferences), the Achilles’ heel of previously employed external processing lies in the absence of meaningful and lasting solutions for persons being processed in an extraterritorial facility. The chapter will conclude that, in order to be legally viable, *and* to provide meaningful prospects for refugees and failed claimants alike, programmes of external processing should be embedded in a broader framework addressing the crucial questions of entry, resettlement or repatriation.

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13 Eg A. Francis, ‘Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing’, 20 *IJRL* (2008), p. 283-292; S. Legomsky, ‘The USA and the Caribbean Interdiction Program’, 18 *IJRL* (2006), p. 680 et seq; Australian Human Rights Commission (2009), para. 8.2.

## 7.2 THE LOGIC OF EXTERNAL CONTAINMENT UNDER US AND AUSTRALIAN PRACTICES

### 7.2.1 The US offshore programme

The United States Naval Station at Guantánamo Bay, situated on a strip of land leased from Cuba on a permanent basis, has been used at various points to house migrants and refugees, predominantly Cubans and Haitians in the 1990s. The Naval Station remains in use today to accommodate small numbers of migrants who have a possibly valid refugee claim and it is retained as a contingency facility for future large scale migration crises.

The base was first opened for migrants in November 1991, when United States Coast Guard cutters were becoming severely overcrowded by intercepted Haitians who had fled their country after the ousting of President Aristide in September that year.<sup>14</sup> Reluctant to proceed with the standing policy of forcibly returning Haitians boat migrants to their home country and failing to secure options for their reception in third countries in the region, the US administration opened a camp at the Naval Station, where the migrants were pre-screened for possible asylum in the United States. Over the following eighteen months, more than 36,000 Haitian refugees were processed in Guantánamo Bay, with 10,000 screened in and allowed entry into the United States, while the remainder were repatriated to Haiti. A smaller number of refugees who were infected with the HIV virus were initially barred from entering the United States, and only brought to US territory under the Clinton administration in June 1993, after a federal judge had ordered the closure of the facility.<sup>15</sup> The policy of temporarily harboring Haitians in Guantánamo Bay had at that time already been reversed as a consequence of the Kennebunkport Order of May 1992, issued after a renewed surge of Haitian boat migrants threatened to overburden the Guantánamo Bay facility, and according to which the US Coast Guard was to immediately return all intercepted migrants to Haiti without the conducting of refugee interviews.<sup>16</sup>

The migrant facility in Guantánamo Bay was reopened in July 1994, when violence had broken out again in Haiti and when President Clinton bowed to the pressure to abandon the no-screening return policy. The new offshore programme entailed the bringing of all Haitians expressing a fear of persecution to a location in the region where they would be processed as potential

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14 For an extensive historical account, eg R.E. Wasem, Congressional Research Service, 'U.S. Immigration Policy on Haitian Migrants', CRS Report for Congress, 31 March 2010; S. Ignatius, 'Haitian Asylum-Seekers: Their Treatment as a Measure of the INS Asylum Officer Corps', 7 *Georgetown Immigration Law Journal* (1993), p. 119-125; H.H. Koh, 'America's Offshore Refugee Camps', 29 *University of Richmond Law Review* (1994), p. 139-173.

15 H.H. Koh (1994), p. 143-151; N. White, 'The Tragic Plight of HIV-Infected Haitian Refugees at Guantánamo Bay', 28 *Liverpool Law Review* (2007), p. 249-269.

16 See also chapter 6.4.1.

refugees. Those found to be a refugee were not granted the opportunity of obtaining asylum in the United States, but should instead be resettled in a third country. To this end, the US entered into agreements allowing for the opening of other reception centers across the Caribbean, including in Jamaica and the Turks and Caicos Islands.<sup>17</sup> The large majority of the Haitian migrants held in Guantánamo could however, after the return of President Aristide in October 1994, be gradually repatriated to Haiti under the consideration that the country had become safe.

In August 1994, the US government had decided to use the Guantánamo Bay facility also for a sudden surge of Cubans trying to migrate to the US by boat, thereby reversing the three-decade long US policy of welcoming Cubans fleeing from Fidel Castro's regime. The decision constituted a response to the announcement of Fidel Castro that he would no longer prevent Cubans from leaving Cuba, prompting over 30.000 Cubans to exit their country in small and often unseaworthy boats. As with the Haitians, those Cubans found to be refugees were not allowed to apply for asylum in the United States but ought to be resettled in third countries in the region.<sup>18</sup> In total, 28.000 Cubans were granted temporary refuge in Guantánamo Bay. A further 9.000 migrants were brought to a US military facility in Panama.<sup>19</sup>

After signing an agreement with Cuba, on 2 May 1995, the Clinton administration reversed its previous position of not allowing the detained migrants entry into US territory by announcing that most of the Cubans at Guantánamo Bay would be transferred to the United States and that in the future, those Cubans intercepted at sea would immediately be repatriated to Cuba. This policy shift was partly instigated by the high costs incurred for operating the migrant facility at Guantánamo Bay and by concerns voiced by government officials over the unfavorable conditions within the facility.<sup>20</sup> Further, the promise of the Cuban government to not only take effective measures to prevent future unsafe departures but also to allow the repatriation of Cubans intercepted at sea removed the necessity of retaining the Guantánamo Bay facility as a deterrent for future Cuban migrants. The new policy on Cuban migrants, which remains in force until today, did provide Cubans the possibility of applying for asylum when intercepted at sea. After a preliminary refugee screening at sea, possible Cuban refugees are subsequently transferred to Guantánamo Bay, until a third country can be found for their resettlement.<sup>21</sup> According to a congressional report, from May 1995 through July 2003, about

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17 Koh (1994), p. 154; Wasem (2010), p. 5; Legomsky (2003), p. 681.

18 Koh (1994), p. 154-155; M.E. Sartori, 'The Cuban Migration Dilemma: an Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens', 15 *Georgetown Immigration Law Journal* (2001), p. 328-329.

19 Sartori (2001), p. 331.

20 Ibid, p. 349-350.

21 Ibid, p. 352.

170 Cuban refugees were resettled in 11 different countries, including Spain, Venezuela, Australia and Nicaragua.<sup>22</sup>

Since the large scale exoduses of Haitians and Cubans in the mid-1990s, Guantánamo Bay has been in permanent use for the accommodation of smaller groups of migrants interdicted in the Caribbean. In 2002, President G.W. Bush issued a decree granting the Attorney General the power to maintain custody over and to screen undocumented aliens interdicted in the Caribbean region in the Guantánamo Naval Base or another appropriate facility.<sup>23</sup> The decree specified that aliens determined not to be persons in need of protection should be held in custody until such a time as they are returned to a country of origin or transit and that the US government shall execute a process for resettlement in third countries of persons identified as in need of protection. Since 2003, migrants are being held in the Migrants Operations Centre, operated by the private company GEO Group, which has a capacity of 130 migrants but typically keeps fewer than 30 people.<sup>24</sup> It was used again for the temporary protection of Haitian refugees from 2004 onwards, when violence had resurfaced in Haiti and when President G.W. Bush decided to re-install the policy of summary returns to Haiti, except for those migrants who had indicated a need for protection and who passed a subsequent on board pre-screening refugee interview.<sup>25</sup> In 2005, only nine of 1.850 interdicted Haitians were transferred to Guantánamo Bay and only one of those was found to be a refugee.<sup>26</sup> The center is further retained as a contingency facility for a future large scale migration crisis. In 1999, the US government had considered the naval base at Guantánamo Bay as a temporary safe haven for approximately 20.000 refugees from Kosovo, but eventually abandoned the idea.<sup>27</sup> In the beginning of 2010, the US government also initiated plans to use the Guantánamo Naval Base in the event of a sudden outflow of Haitians in the aftermath of the Haiti earthquake.<sup>28</sup>

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22 R.E. Wasem, Congressional research Service, 'Cuban Migration to the United States: Policy and Trends', CRS Report for Congress, 2 June 2009.

23 Executive Order 13276 of 15 November 2002, 'Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region'.

24 GEO group, <http://www.thegeogroupinc.com>.

25 Legomsky (2006), p. 682, Wasem (2010), p. 5. Frelick has described the on-board refugee screening process as involving a 'shout test' under which 'only those who wave their hands, jump up and down and shout the loudest are afforded a shipboard refugee pre-screening interview': B. Frelick, '"Abundantly Clear: Refoulement"', 19 *Georgetown Immigration Law Journal* (2004), p. 246.

26 Wasem (2010), p. 5.

27 *The New York Times* 6 April 1999, 'Crisis in the Balkans: The Haven; U.S. Chooses Guantánamo Bay Base in Cuba for Refugee Site'.

28 Fox News 15 January 2010, 'U.S. Suspends Haitian Deportations as Florida Prepares for Migration From Quake Zone'.



### 7.2.2 Australia's excised territories and offshore processing

Australia's offshore programme for intercepted asylum-seekers, officially known as the Pacific Strategy but colloquially known as the Pacific Solution, was installed in the aftermath of the 2001 Tampa-incident, discussed in chapter 6, and constituted a validation and consolidation of the actions taken by the Australian government in respect of the boat people found on the *MV Tampa*. Although the offshore processing centre on the Pacific island state of Nauru was closed in the beginning of 2008, the Australian government has continued a policy of excluding boat arrivals from the ordinary terms of the Australian Migration Act and to process them instead in a facility on Christmas Island, one of Australia's overseas territories.

Under the Pacific Solution, a legislative scheme was put in place allowing for the transfer of unauthorized boat arrivals from September 2001 onwards to Nauru and Manus Island, Papua New Guinea. In accordance with memoranda of understanding signed with Nauru and Papua New Guinea, offshore processing facilities were established on the two islands on 19 September 2001 and 21 October 2001, providing for the accommodation of up to 1,200 persons in Nauru and 1,000 in Papua New Guinea.<sup>29</sup> In return, the governments of Nauru and Papua New Guinea were offered financial arrangements.<sup>30</sup> The processing centre in Manus Island was in use for a relatively short period and closed in July 2003, although it was retained as a contingency facility.<sup>31</sup> The facility in Nauru remained in use until 8 February 2008, when a final group of 21 Sri Lankans, found to be refugees, were resettled in Australia as part of the humanitarian resettlement program. In total, 1,637 persons were processed in the Nauru and Manus facilities, of which the majority had the nationality of Iraq or Afghanistan.<sup>32</sup>

Persons found to be a refugee in the offshore processing centers were not legally entitled to enter Australia, but places in third countries were sought for their resettlement. These efforts were only partly successful, with New Zealand being the only country which was prepared to accept a substantial number of refugees. Out of the 1,637 persons brought to Nauru and Manus, 1,153 were found to be refugees.<sup>33</sup> New Zealand allowed for the resettlement of 360 persons and smaller numbers were accepted by Canada, Sweden,

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29 Parliament of Australia, Report of the Senate Select Committee on a Certain Maritime Incident, 23 October 2002, paras. 10.33-10.38, 10.51-10.61.

30 Ibid.

31 S. Taylor, 'Australia's Pacific Solution Mark II: The Lessons to be Learned', in: S. Blay, Burn and Keyzer (2008), p. 107

32 Senator Chris Evans, Minister for Immigration and Citizenship, 'Last refugees leave Nauru', press release 8 February 2008; Parliament of Australia Background Note, 'Boat arrivals in Australia since 1976', 25 June 2009, p. 13-16.

33 Ibid.

Denmark and Norway.<sup>34</sup> The remainder were eventually taken to Australia on temporary visas.<sup>35</sup>

In December 2007, the new Rudd government made the decision to close the detention facility on Nauru and to resettle the remaining detainees on mainland Australia. The new government did not however fundamentally depart from the system of excluding unauthorized boat arrivals from the ordinary migration regime. The legislative arrangements pertaining to Australia's excised territories and the special status of offshore entry persons remained in place, but instead of bringing these persons to centers in 'declared countries', the new arrangement provided for the bringing of all unauthorized boat arrivals to a newly built facility on Australia's Christmas Island, opened in December 2008, where they are held in immigration detention until they have been granted a visa or are removed from Australia.<sup>36</sup> Originally, the new centre had a capacity to house 800, but this was rapidly increased to 2040 in early 2010.<sup>37</sup> The official capacity was nonetheless exceeded for the first time in April 2010.<sup>38</sup>

Refugee claims on Christmas Island are not tested within the framework of Australia's Migration Act, but directly against the Refugee Convention. Those determined to be a refugee are not legally entitled to enter Australia, although in practice, the Minister for Immigration and Citizenship will 'lift the bar' on making a valid visa application for all persons found to be a refugee, enabling them to enter into mainland Australia.<sup>39</sup> Those not found to entertain Australia's international protection obligations are subject to removal from Australia in accordance with the ordinary provisions of the Migration Act and removed as soon as practicable.

In July 2010, the new Australian Prime Minister Gillard announced plans to create a regional processing centre in East Timor for the status determination of persons intercepted en route by boat to Australia.<sup>40</sup> These plans are not further discussed here.

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34 The Senate, Legal and Constitutional Legislation Committee, Commonwealth of Australia, 'Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006' (Report), June 2006, para. 3.90.

35 Ibid.

36 M. Grewcock, 'Systems of Exclusion: The Rudd Government and the 'End' of the Pacific Solution', 19 *Current Issues in Criminal Justice* 2007-2008, p. 364. Australian Human Rights Commission (2009), part C. introduction.

37 *ABC News* 7 March 2010, 'Rudd shoots down detention centre report'.

38 *The Australian* 2 April 2010, 'Capacity exceeded on Christmas Island with 138 new arrivals'.

39 Australian Human Rights Commission (2009), para. 7.

40 *BBC News* 6 July 2010, 'Australian PM Gillard plans E Timor asylum centre'; *The Age* 6 July 2010, 'Gillard Timor policy 'responds to xenophobia''.

### 7.3 THE FEASIBILITY OF PROCEDURAL CONTAINMENT

The US and Australian policies of offshore processing are both premised on a system whereby detained persons are barred from invoking domestic migration legislation and from accessing courts. This logic of procedurally containing a specific group of migrants coincides with a substantial degree of executive discretion over the status and detention of migrants held in an offshore facility.

In the context of the US offshore programme, the excluding of migrants held at Guantánamo Bay from statutory protection was made possible by a series of executive decisions and the confirmation of their legality by domestic US courts. The Presidential Kennebunkport Order of 1992 held Article 33 Refugee Convention not to be applicable outside the territory of the United States and authorized the Attorney General to exercise 'unreviewable discretion' in deciding upon the return of refugees.<sup>41</sup> This unassailable executive discretion was confirmed by the Executive Order of 2002, which explicitly stated that the powers accorded to the Attorney General were not reviewable, that the processing of interdicted migrants did not create rights or benefits that are enforceable at law, and that the establishment of offshore arrangements cannot be construed as to require any procedure to determine whether a person is a refugee or otherwise in need of protection.<sup>42</sup> A variety of policy guidelines were adopted regulating the procedures for screening and pre-screening for refugee status outside US territory, which provided for examinations undertaken by US immigration officers outside the terms of the Immigration and Naturalization Act, without the possibility of review or appeal and without a right to legal representation.<sup>43</sup>

Although lower US Courts had been divided on the question of applicability of immigration statutes and constitutional rights to the persons held in Guantánamo Bay,<sup>44</sup> the Supreme Court, in *Sale*, ultimately found the US Immigration and Nationality Act not to apply beyond the geographic borders of the United States and held the programme of summarily returning interdicting migrants at sea to be subjected to neither domestic nor international obligations.<sup>45</sup> This ruling was followed up in two later cases concerning a series of claims brought by Haitians and Cubans detained at Guantánamo Bay, relating not only to their entitlements under the Refugee Convention and domestic asylum legislation, but also to several rights guaranteed under the US Constitution. The claims were rejected by the US Court of Appeals for the Eleventh Circuit, holding that domestic legislation could not be presumed to

41 Executive Order 12807 of 24 May 1992, 'Interdiction of Illegal Aliens'.

42 *Supra* n. 23.

43 Ignatius (1993), p. 121-129; also see Canadian Council for Refugees, 'Interdiction and Refugee Protection: Bridging the Gap', International Workshop, Proceedings, Ottawa, 29 May 2003, p. 4.

44 See, extensively, Koh (1994) p. 143-148.

45 On the *Sale* decision extensively, chapter 4.3.1.1.

apply beyond the borders of the US without express congressional authorization and that the Haitians and Cubans held in Guantánamo Bay were 'without legal rights that are cognizable in the courts of the United States'.<sup>46</sup> Instead, the court found the US policy of providing these migrants a safe haven a 'gratuitous humanitarian act which does not in any way create even the putative liberty interest in securing asylum processing (...)'. Although recognizing the difficulties of their prolonged stay at the naval base, the court considered this a problem 'to be addressed by the legislative and executive branches of our government'.<sup>47</sup> As noted below however, more recent US litigation on the detention of terrorist suspects in Guantánamo Bay signifies a shift towards the acceptance that US courts do enjoy jurisdiction in reviewing the conformity of detention on Guantánamo Bay with the US Constitution.<sup>48</sup>

Under the Pacific Strategy, Australia's government similarly opted for the establishment of an offshore programme following a system of unreviewable executive control. This system was grounded in a substantial revision of Australia's Migration Act, issued shortly after the Tampa-incident.<sup>49</sup> The revision pertained mainly to the legal status and procedural guarantees accorded to irregular migrants arriving by boat. It removed particular overseas Australian territories from the Australian migration zone (these were called 'offshore excised places'), to the effect that persons arriving at such places ('offshore entry persons') were barred from applying for a visa under Australia's Migration Act.<sup>50</sup> This included applications for a protection visa, the ordinary document granted to persons who are recognized as refugees. Further, the amendments allowed for the taking of offshore entry persons to a 'declared country', which is a country declared by the minister as *inter alia* providing access to effective status determination procedures; protection pending the status determination; and protection for refugees pending their voluntary repatriation or resettlement in another country.<sup>51</sup> Apart from being prevented from applying for a visa, the amended Migration Act also barred offshore entry persons from instituting legal proceedings in Australian courts, including proceedings relating to their entry, their status, the lawfulness of detention and their transfer to a 'declared country'.<sup>52</sup> The system put in place ensured that offshore entry persons fell outside the refugee status determination procedure regulated by the Migration Act, preventing them, perhaps most crucial-

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46 *Cuban American Bar Association (CABA) v Cristopher*, 43 F.3d 1412 (11<sup>th</sup> Cir. 1995). *Haitian Refugee Center, Inc. v Christopher*, 43 F.3d 1431 (11<sup>th</sup> Cir. 1995).

47 *Ibid.*

48 *Infra* n. 64 and accompanying text.

49 For a detailed description of the legislative scheme putting in place the Pacific Solution, see eg P. Mathew, 96 *AJIL* (2002), p. 663-5; Taylor (2008); Kerr, (2008).

50 Section 46A Migration Act invalidates visa applications of offshore entry persons.

51 Section 198A(3) Migration Act.

52 Section 494AA Migration Act.

ly, from invoking a right of entry once they were found to be a refugee. Instead, offshore refugee claims were considered by Australian immigration officers under a non-statutory procedure, without granting claimants a right to legal representation, without access to independent merits review, and with no, or very limited, access to judicial review.<sup>53</sup>

The special legislative arrangements pertaining to excised territories and offshore entry persons remained in force after the closure of the Nauru facility and the formal dismantling of the Pacific Solution. The main difference with the past policy is that, instead of being brought to a processing center in a third, 'declared' country, offshore entry persons are since 2008 brought to Christmas Island, which is properly situated within the territorial sovereignty of Australia. Similar to the previously applicable scheme, refugee claims lodged at Christmas Island are tested directly against the definitional terms of the Refugee Convention, without a system of legally enforceable guarantees and without an entitlement for persons determined to be a refugee to enter Australia.<sup>54</sup> The new arrangement did provide for two procedural changes: the introduction of access for offshore entry persons to Australia's legal aid programme and the installment of an Independent Reviewer competent to review negative decisions on refugee claims and to issue a non-binding recommendation to the minister to reconsider lifting the bar to allow a person to apply for a protection visa.<sup>55</sup> A further difference of considerable practical importance is that the Australian government no longer maintains a policy of granting visas to refugees only as a last resort, i.e. if no other countries can be found for their resettlement.<sup>56</sup>

Within the European context, both the inapplicability of the law and the barriers to judicial review are inherently problematic from a human rights perspective. Although it is, as such, possible for states to differentiate in their domestic laws between various forms of entry or to consider particular laws to only apply within certain parts of its territory<sup>57</sup> (or, conversely, also to

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53 Taylor (2008), p. 108; S. Kneebone, 'The Pacific Plan: The Provision of 'Effective Protection?', 18 *IJRL* (2006), p. 715. Although the non-statutory determination procedure does not make provision for judicial review, failed claimants may possibly invoke a constitutional right to seek a remedy in court; see, extensively: Kerr, (2008), p. 57-68.

54 For a summary of the procedure for determining refugee status on Christmas Island, see Australian Human Rights Commission (2009), p. 14-17.

55 *Ibid.*

56 *Supra* n. 39.

57 Various authors have nonetheless submitted that the putting into place of a distinct processing regime for unauthorized boat arrivals amounts to discriminatory treatment: Francis (2008), p. 284; Legomsky (2006), p. 693; S. Kneebone, 'Controlling Migration by Sea: The Australian Case', in: B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston: Martinus Nijhoff (2010), p. 362. Although the singling out of one specific category of migrants for the purpose of offshore processing, for example on account of nationality, may amount to discrimination, these authors do not substantiate

foreign territories), these arrangements must conform with international law. Crucially, as extensively discussed in chapter 2 of this book, states cannot simply excise particular territories from their human rights obligations, nor are they absolved from respecting those obligations when undertaking activity in a foreign territory.<sup>58</sup> In so far as governmental activity interferes with human rights, the law must set limits to the scope of executive power and must provide guarantees against arbitrary interferences. This implies not only that persons held in an offshore facility may invoke human rights, but also that the state holding them in such a facility must ensure that legal regulations are in place which guarantee against the abuse of discretionary state power.<sup>59</sup>

From the same rationale, migrants held in an offshore facility may invoke the right of having access to a court or an effective remedy. In general terms, Article 13 ECHR and Article 2 (3)(a) ICCPR oblige states to ensure the availability of an effective remedy to vindicate the substantive rights and freedoms guaranteed under both Conventions. Specific provisions on judicial review apply to situations of detention (Articles 5 (4) ECHR and 9 (4) ICCPR).<sup>60</sup> Further, Article 16 Refugee Convention provides that '[a] refugee shall have free access to the courts of law on the territory of all Contracting States.' This latter provision, which, similar to Article 33 of the Refugee Convention, does not require any specific attachment of the refugee with the state, has been interpreted as necessarily applying also to those refugees who have not yet been formally declared to be a refugee.<sup>61</sup>

The programmes of offshore processing in Guantánamo Bay, Nauru and Christmas Island reveal a paradoxical attitude towards the protection of human rights. Notably, as a matter of policy, and with the exception of the United States 'no-screening policy' in respect of Haitians in the period 1992-1994, the Australian and US offshore programmes upheld a pledge to guarantee refugee rights: the very purpose of offshore processing was to ensure that pre-border migration controls paid respect to the special position of refugees, by granting them a safe haven and by not returning those found to be a refugee to their country of origin. The Australian government, in this connection, has explicitly considered itself bound, at least so under the Christmas Island arrangement,

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whether discrimination based on mode of arrival can be brought under one of the prohibited discrimination grounds. A further question to be determined before one can speak of prohibited discriminatory treatment is whether there is an objective and reasonable justification for the difference in treatment.

58 See chapters 2 and, by analogy, 6.4.

59 Ibid, and especially the discussions in chapter 6.4.2.

60 The Human Rights Committee has considered the Australian restrictions on judicial review of administrative detention to be in violation of Article 9 (4) ICCPR: HRC 30 April 1997, *A. v Australia*, no. 560/1993, para. 9.5.; HRC 6 November 2003, *Bakhtiyari v Australia*, no. 1069/2002, para. 9.4; HRC 18 September 2003, *Baban v Australia*, no. 1014/2001, para. 7.2.

61 Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005), p. 645; Willheim (2003), p. 172.

to the terms of the Refugee Convention.<sup>62</sup> But this pledge to safeguard rights of refugees was implemented within a system designed to prevent migrants from invoking any right which may effectuate their entry into the state. This system necessitated the abandonment of procedural rights and norms of good administration as equally protected under human rights law, including the right to a fair and effective determination of asylum claims, the right to an independent review of the transfer to a processing centre located in a third country, and the right to an independent review of decisions of repatriation or resettlement from the processing center. Ultimately, this strategy of procedural containment leaves the upholding of refugee and other fundamental rights to the exclusive discretion of the state, which is an unacceptable proposition under human rights law. As an American federal judge put it in a judgment on the legal position of the HIV infected refugees whose stay at Guantánamo Bay was prolonged: “[i]f the Due Process Clause does not apply to the detainees at Guantánamo, [the US Government] would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin.”<sup>63</sup> The implication of the recognition that human rights do apply to programmes of offshore processing is not only that they should pay special consideration to refugees. It also implies that offshore processing is embedded in a framework of procedural guarantees capable of ensuring the respect for those rights.

The more recent developments in US litigation on the detention of terrorist suspects in Guantánamo Bay also tend towards the acceptance of this maxim. The US Supreme Court considered that US courts are empowered to hear *habeas corpus* challenges filed by detainees at Guantánamo Bay, and that the scope of judicial review extends to provisions of the US Constitution.<sup>64</sup> The Supreme Court found reason to depart from its earlier case law that non-citizens detained in foreign territories were never deemed to have rights under the Constitution, in view of the exceptional duration of the detention and because the detainees were held in a territory that, while technically not part of the United States, is under the complete and total control of our Government’.<sup>65</sup>

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62 According to the Australian government: ‘The retention of the excision zone does not prevent Australia fulfilling its international obligations under the Refugees Convention and under other relevant international instruments. Regardless of where, and how, unlawful non-citizens arrive in Australia, those who claim asylum have their protection claims assessed and are provided with protection in Australia if found to be owed protection.’ Australian Government Department of Immigration and Citizenship, ‘Fact Sheet 75 – Processing Unlawful Boat Arrivals’, available at <http://www.immi.gov.au/media/fact-sheets/75processing-unlawful-boat-arrivals.htm> (accessed 18 May 2010).

63 U.S. District Court for the Eastern District of New York 7 april 1992, *Haitian Centers Council, Inc v. Sale*, 823 F.Supp. 1028 (E.D.N.Y. 1993). See extensively White (2007), p. 249-269.

64 U.S. Supreme Court 28 June 2004, *Rasul v Bush* [2004] 542 U.S. 466; U.S. Supreme Court 12 June 2008, *Boumediene v Bush* [2008] 553 U.S. 723.

65 *Boumediene v Bush*, note above.

Although the reasoning of the Supreme Court may be relied upon also by migrants in the context of legal challenges against detention, the terrorist cases do not necessarily have ramifications in the context of challenges against removal to a third country. Notably, a US Court of Appeals, in relying on the 2008 Supreme Court's decision in *Munaf v Geren* on the transfer of detainees in Iraq,<sup>66</sup> concluded that detainees in Guantánamo, in obstructing their removal to a third country, cannot invoke the Convention Against Torture, because US law only allows judicial review under the CAT in respect of removal proceedings taking place within US territory.<sup>67</sup>

#### 7.4 THE FEASIBILITY OF PHYSICAL CONTAINMENT

A prominent feature of the processing schemes established in Nauru, Christmas Island and Guantánamo Bay is the mandatory detention of migrants. The physical containment of irregular boat arrivals ensures not only that they are prevented from effectuating unauthorized entry and residence, but also serves as a deterrent for future arrivals.<sup>68</sup> The systematic detention of irregular migrants in an offshore facility has attracted considerable criticism.<sup>69</sup> Most importantly, the setting up of a detention regime which is not subject to judicial review, without maximum time limits and no guarantees as to resettlement or repatriation, would potentially allow for migrants to be detained for an indeterminate and excessive period of time. Further, contrary to the detention of asylum-seekers inside the territory of the state of refuge, offshore detention in a remote island facility by its nature restricts possibilities to engage in meaningful activities such as work or education or to maintain contacts with the outside world. In case of refugees, mandatory detention is generally seen to contrast with the notion that, in view of the character and causes of their flight, detention should only be used as a last resort and only upon an individual assessment of the necessity of detention.

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<sup>66</sup> U.S. Supreme Court 12 June 2008, *Munaf v Geren* [2008] 553 U. S. \_\_\_\_

<sup>67</sup> U.S. Court of Appeals for the District of Columbia Circuit 7 April 2009, *Kiyemba v Obama*, 561 F.3d 509. The case was subsequently brought to the Supreme Court. Also see N. Frenzen, 'US Migrant Interdiction Practices in International and Territorial Waters', in: Ryan and Mitsilegas (2010), p. 393-395.

<sup>68</sup> Francis (2008), p. 274; Parliament of Australia Background Note, 'Boat arrivals in Australia since 1976', 25 June 2009, p. 13. In the UK's New Vision for Refugees, it was considered that '[t]his approach could act as a deterrent to abuse of the asylum system', 'New international approaches to asylum protection and processing', para. 2.

<sup>69</sup> Eg Australian Human Rights Commission (2009); Australian Human Rights and Equal Opportunity Commission, 'Submission to the Senate Legal and Constitutional Legislation Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006', 22 May 2006; HRC, Concluding observations on Australia, 7 May 2009, CCPR/C/AUS/CO/5, para. 23.



The detention of asylum-seekers solely on account of unauthorized entry is controversial but not necessarily prohibited.<sup>70</sup> Under the right to liberty protected by Articles 5 ECHR and 9 ICCPR, detention which forms part of a process to determine whether persons should be granted entry clearance or asylum is not in itself prohibited, provided it cannot be branded as arbitrary. The ECtHR, in *Saadi v United Kingdom*, concluded that states are permitted under Article 5 (1)(f) to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not, but that, to avoid being branded as arbitrary, detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued.<sup>71</sup> The Court explicitly considered that immigration detention does not require a more stringent proportionality test, i.e. applying detention only as a measure of last resort or striking a balance between the interests involved.<sup>72</sup> Albeit less unambiguous, the Human Rights Committee has also recognized that circumstances particular to the arrival of asylum-seekers and other unauthorized migrants, such as the need for identification and the proper assessment of claims of entry, may warrant their detention.<sup>73</sup> The Human Rights Committee has, in its various pronouncements on the detention of asylum-seekers in Australia, never concluded that Australia's policy of mandatorily detaining all asylum-seekers, on the sole ground of them having arrived in Australia without prior authorization, contravenes Article 9 ICCPR – although it has repeatedly denounced the restrictions to judicial review and

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70 See extensively Hathaway (2005), p. 413-439. UNHCR submits that there should be a presumption against the detention of asylum-seekers and that detention should only take place after a full consideration of all possible alternatives: UNHCR, 'Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum-seekers', February 1999, Guideline 3; Also see the dissenting opinion of judges Rozakis, Tulkens, Kovler Hajiyeve, Spielmann and Hirvelä in ECtHR 29 January 2008, *Saadi v the United Kingdom* (Grand Chamber), no. 13229/03.

71 *Saadi v United Kingdom* (Grand Chamber), paras. 70-74.

72 Ibid, paras. 70-73.

73 In *A. v Australia*, the Human Rights Committee considered that 'the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period.' HRC 30 April 1997, *A. v Australia*, no. 560/1993, para. 9.4. Also see HRC 26 August 2004, *Francesco Madafferi and Anna Maria Immacolata Madafferi v. Australia*, no. 1011/2001, para. 9.2; HRC 6 November 2003, *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, no. 1069/2002, para. 9.2. *Contra*, Cornelisse, who concludes that the HRC would not accept general justifications for the detention of asylum-seekers. However, the cases cited in support of that proposition concern violations of Article 9(1) ICCPR on account of prolonged detention instead of the initial decision of detention, G. Cornelisse, *Immigration Detention and Human Rights. Rethinking Territorial Sovereignty*, Leiden/Boston: Martinus Nijhoff (2010), p. 254.

the prolonged duration of detention.<sup>74</sup> In *Bakhtiyari v. Australia*, the Committee found the detention of an asylum-seeker having arrived by boat, in light of the facts that his identity was in doubt and that he had lodged a claim for protection, not to be arbitrary and in breach of Article 9(1) ICCPR.<sup>75</sup> The ECtHR and HRC have however underlined that the notion of arbitrariness may require more vigilance in cases of persons with special needs, including unaccompanied minors, families with minor children or persons with a serious illness.<sup>76</sup>

This rather broad discretion accorded to the state in deciding upon the detention of potential immigrants is however circumscribed by the conditions stemming from the prohibition of arbitrariness in respect of *continued* detention. The detention of unauthorized arrivals, while initially warranted, may become arbitrary if it is *inter alia* no longer connected to its purpose or if the duration of detention exceeds that reasonably required for the purpose pursued.<sup>77</sup> These considerations also apply to the detention of persons whose claims have been refused and who are detained with a view to deportation. According to the ECtHR 'any deprivation of liberty under Article 5 (1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f)'.<sup>78</sup> The HRC has applied a more fully fledged proportionality assessment in respect of continued detention, which includes consideration of whether less invasive means can achieve the same ends, for example the imposition of reporting obligations.<sup>79</sup> The conducting of a proportionality test is also warranted under Article 31 (2) Refugee Convention, which prohibits the imposition of restrictions on the free movement of refugees on account of illegal entry 'other than those are necessary'.<sup>80</sup>

<sup>74</sup> Ibid.

<sup>75</sup> *Bakhtiyari v. Australia*, para. 9.2. The Committee further considered relevant that the person in question was granted a protection visa and released seven months after his arrival.

<sup>76</sup> Ibid, para. 9.3; ECtHR 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03; ECtHR 19 January 2010, *Muskhadzhiyeva a.o. v Belgium*, no. 41442/07; *Madafferi v. Australia*, para. 9.3. See, in general, P. Boeles et al, *European Migration Law*, Antwerp: Intersentia (2009), p. 386-387.

<sup>77</sup> *Saadi v United Kingdom*, paras. 74, 77. Also see *A. v Australia*, para 9.4; HRC 18 September 2003, *Omar Sharif Baban v Australia*, no. 1014/2001, para. 7.2.

<sup>78</sup> *Chahal*, paras. 112-113; ECtHR 8 October 2009, *Mikolenko v Estonia*, no. 10664/05, paras. 59, 63.

<sup>79</sup> HRC 28 October 2002, *C. v Australia*, no. 900/1999, para 8.2.; *Bakhtiyari v Australia*, para 9.3.; *Baban v Australia*, para. 7.2.

<sup>80</sup> Goodwin-Gill, referring to the drafting history, has interpreted Article 31(2) Refugee Convention as allowing for the initial detention of asylum-seekers for identification and investigation purposes but as prohibiting prolonged detention unless other justifications arise. G.S. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection', in: E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 195-196. Note that Article 31 Refugee

Because we may assume that offshore detention also serves the goal of preventing irregular migrants and asylum-seekers from effecting an unauthorized entry, it would not seem that systems of offshore detention run in themselves counter to the right to liberty. However, unlike, for example, the fast-track procedures for asylum-seekers coupled with mandatory detention for specific categories of asylum-seekers as employed by several EU Member States, the Australian and US offshore programmes not merely pertain to the swift and efficient determination of identities and claims of entry. They serve the further purpose of physically excluding migrants until resettlement or repatriation can be arranged, or when, as a last resort, authorization to enter is granted. In general, to maintain detention until a solution as to removal to a particular country can be arranged sits uncomfortably with safeguards against unreasonable duration of detention. These safeguards imply, amongst others, that the identification and verification of claims of entry must be prosecuted without undue delay and that, as regards failed claimants, prolonged detention can only be maintained as long as there is a 'reasonable prospect of removal' or as long as 'action is being taken with a view to deportation'.<sup>81</sup> As regards refugees, it has further been submitted that when detention can no longer be connected to the administrative purposes of identification, status determination or repatriation, it amounts to the imposition of a penalty on account of illegal entry in contravention of Article 31 (1) Refugee Convention.<sup>82</sup>

Especially problematic, in this respect, is that the past US and Australian offshore programmes were established without an adjoining strategy as to the eventual release – in the form of authorization of entry, resettlement or repatriation – of the migrants after their claim had been determined. The ultimate consequence of the decision of the Australian government to embark upon a strategy of detaining and processing boat arrivals in the Nauru facility without authorising their entry, and with neither having procured in advance resettlement and repatriation guarantees from third countries, was that successful and failed claimants alike were compelled to remain within the Nauru facility for considerable periods of time. It has been reported that asylum-seekers recognized as refugees remained on Nauru for four years before being brought to Australia.<sup>83</sup> Another example concerns the HIV-infected Haitian

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Convention contains an explicit territorial restriction in that it only applies to refugees who have 'entered or are present' in the Contracting State's territory.

81 *Supra* n. 77. Also see HRC 26 March 2002, *Jalloh v the Netherlands*, no. 794/1998, para. 8.2.

82 Hathaway (2005), p. 422. Francis (2008), p. 284; J. von Doussa, 'Human Rights and Offshore Processing', in: Blay, Burn and Keyzer (2008), p. 48-49; Australian Human Rights Commission (2009), para. 8.1. Note however the territorial restriction to the applicability of Article 31 Refugee Convention, see n. 80 *supra*.

83 Human Rights and Equal Opportunity Commission, 'Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006', para. 4.14; S. Taylor, 'Australia's Pacific Solution Mark II:

refugees who were confined to a separate facility in Guantánamo Bay for eighteen months before being allowed entry into the US for further medical treatment and processing.<sup>84</sup> In respect of the current detention of asylum-seekers at Christmas Island, the Australian Human Rights Commission has noted that the arrangements in place have not dispelled the risk that people may be held for prolonged or indefinite periods.<sup>85</sup>

Accordingly, operations of external processing which follow a policy presumption of prolonging detention until a definite solution on their removal can be arranged is prone to conflict, in individual cases, with safeguards against arbitrary detention. In view of the often unsuccessful efforts to secure resettlement or repatriation, it would seem imperative – in order to comply with requirements of periodic review of the justifications for detention and the possibility of release – that offshore detention is complemented with a meaningful ‘exit strategy’ in case a prospect of removal or resettlement to a third country ceases to exist. Although the US and Australian governments did allow, for humanitarian or practical reasons, the sporadic entry of certain categories of migrants into their territory (or, in the case of Christmas Island: ‘community detention’<sup>86</sup>), these decisions were of ad hoc and discretionary character and not based upon existing guarantees established in law.<sup>87</sup>

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The Lessons to be Learned’, in: Blay, Burn and Keyzer (2008), p. 108; S. Kneebone, ‘Controlling Migration by Sea: The Australian Case’, in: Ryan and Mitsilegas (2010), p. 362.

84 White (2007), p. 263

85 Australian Human Rights Commission (2009), para. 9.2.

86 Under the presently functioning Christmas Island scheme, the Australian government has pledged to detain unauthorized arrivals only for the purpose of health, identity and security checks and that, once checks have been successfully completed, continued detention is unwarranted: C. Evans (Minister for Immigration and Citizenship), ‘New directions in detention: restoring integrity to Australia’s immigration system’, Speech delivered 29 July 2008. Immigration detainees whose claim has not yet been resolved, are then eligible for ‘community detention’ on Christmas Island, allowing them to reside at a specified place where they are generally free to come and go and are not subject to constant supervision. The Australian Human Rights Commission has observed however that, due to the small size of the community on Christmas Island and the significant number of detainees, the option of community detention is only sporadically used; see Australian Human Rights Commission (2009), para. 13.

87 In respect of the first large influx of Cuban migrants in 1994 of which the majority were brought to Guantánamo Bay, the U.S. government made frequent humanitarian exceptions to its initial position that the Cubans would not gain entry into the U.S., and granted parole to unaccompanied minors, families and persons suffering from medical emergencies; see M.E. Sartori, ‘The Cuban Migration Dilemma: An Examination of the United States’ Policy of Temporary Protection in Offshore Safe Havens’, 15 *Georgetown Immigration Law Journal* (2001), p. 348-349. Under the presently functioning Christmas Island scheme, the Australian government has commenced with the transfer of persons who have been denied refugee status from Christmas Island to detention facilities on mainland Australia, although this does not change their entitlements under Australia’s Migration Act; *ABC News* 29 March 2010, ‘Asylum-seeker transfer could spark test case’.

The conclusion that programmes of offshore processing should be complemented with meaningful exit guarantees in the sphere of entry, resettlement or repatriation acquires specific gravity in respect of refugees, because the Refugee Convention presupposes that refugees should not be isolated from their host communities and that they should, congruent to their level of attachment with the state, eventually be granted a variety of social, economic and social rights.<sup>88</sup> Even though the freedom of movement guaranteed under Articles 31 (2) and 26 Refugee Convention accrues to refugees who are either unlawfully or lawfully *present* in the state's territory and can therefore not literally be construed as applicable to refugees not yet having entered the state, the case law of the European Court of Human Rights and Human Rights Committee indicates that the detention of asylum-seekers must take proper account of their possible entitlements under international law.<sup>89</sup> A system designed to prolong detention in a remote facility beyond what is necessary for status determination or for effectuating resettlement to a third country runs counter to that notion. It fails to recognize the Refugee Convention's underlying premise of creating genuine prospects and possibilities of self-fulfillment for refugees. True, the enjoyment of most of the substantive rights of the Refugee Convention depends upon the prior acquisition of lawful presence or residence. But a system which neither guarantees a right of lawful entry for refugees nor ensures that lawful entry can be obtained into another state, leaves refugees in a legal vacuum, in which the enjoyment of the substantive rights laid down in the Refugee Convention (and in other human rights treaties) is potentially subject to indefinite postponement.

## 7.5 ISSUES OF ATTRIBUTION AND THE ALLOCATION OF RESPONSIBILITY

The foregoing analysis presupposed that external processing engages the international responsibility of the state, on account of the state having brought the migrants under its jurisdiction (thereby enlivening its human rights obligations vis-à-vis the migrants) and on account of potentially wrongful conduct being attributable to that state. A notable feature of external processing is however that it can take place outside the territorial sovereignty of the state and may involve multiple actors, giving rise to questions of jurisdiction, attribution and the allocation of international responsibility.

As regards the offshore programmes initiated at Christmas Island and Guantánamo, these questions are not particularly apparent. Both programmes are of unilateral character, with an easily identifiable state actor, and take place

<sup>88</sup> See extensively Hathaway (2005), p. 978-979.

<sup>89</sup> See, in particular, ECtHR 25 June 1996, *Amuur v France*, no. 19776/92 para. 43 ('States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions'). Also see *Saadi v United Kingdom*, para. 74; *A. v Australia*, para. 9.4.

within the state's territory (Christmas Island) or otherwise within a setting where the state retains exclusive and ultimate control over the migrants, including over detention matters, refugee status determination, resettlement and repatriation (Guantánamo Bay). In the light of the framework on the extraterritorial application of human rights and the allocation of responsibility for wrongful conduct as established in chapters 2 and 3, it can be readily assumed that decisions or activity in the course of external processing which interfere with human rights would come within the scope of the acting state's human rights obligations.<sup>90</sup>

As to the Nauru scheme, a more complex division of labour between different actors was agreed upon. Under the Memorandum of Understanding concluded with the government of Nauru, Nauru agreed to accept 'certain persons' on behalf of Australia, in return for Australia's commitment that it would ensure the departure of the individuals within a reasonable time and that it would fully finance all activities in Nauru.<sup>91</sup> Under a service agreement with Australia, the International Organisation for Migration (IOM) provided reception and processing services, including management of accommodation and the provision of staff.<sup>92</sup> Security tasks were shared between Nauru and Australian officers, with Australian security personnel providing 'the more active security within the centres'.<sup>93</sup> The government of Nauru government had issued special purpose visa to the asylum-seekers which formed the basis for their temporary residence and confinement to the detention facility on its territory.<sup>94</sup> Although UNHCR had initially been involved in the status determination of the asylum-seekers, it later withdrew from that agreement, leaving Australian immigration officers exclusively responsible for the determination of claims.<sup>95</sup>

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90 Cf. ECtHR 30 June 2009, *Al-Saadoon and Mufdhi v United Kingdom*, no. 61498/08 (adm. dec.), paras. 87-89; CAT 21 November 2008, *J.H.A. v. Spain (Marine I)*, no. 323/2007, para. 8.2. See further chapters 2.5 and 3.

91 Parliament of Australia, Senate Select Committee Report (2002), paras. 10.33-10.36. For the operational arrangements, see also High Court of Australia 31 August 2005, *Ruhani v Director of Police [No 2]*, [2005] HCA 43, para. 49-51; S. Taylor, 'The Pacific Solution or a Pacific Nightmare?: The Difference Between Burden Shifting and Responsibility Sharing', 6 *Asia Pacific Law and Policy Journal* (2005), p. 13-14.

92 Parliament of Australia, Senate Select Committee Report (2002), paras. 10.81-10.82.

93 *Ibid*, para. 10.83.

94 *Ruhani v Director of Police [No 2]*, para. 8.

95 According to UNHCR, 'While UNHCR does undertake refugee status determination under its mandate, this is normally undertaken in situations where signatory States have no resources or capacity to conduct the exercise, or where a State is not signatory to the 1951 Convention, thus requiring that UNHCR undertakes refugee status determination in order to ensure the protection of refugees. In the context of extraterritorial processing by Australia, given that Australia is a long-time signatory to the 1951 Convention and has in place its own procedures, these procedures should be applied'; UNHCR, Migration Amendment (Designated Unauthorised Arrivals) Bill. Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Commit-

This division of responsibilities may certainly give rise to difficulties in the allocation of responsibilities; or be used as a pretext to eschew responsibility. It indeed appears that both the Nauru and Australian governments denied responsibility for the situation in which the asylum-seekers were held.<sup>96</sup> Given the plurality of actors involved and the complexity of the legal arrangements, it will depend on the precise complaint at issue and the involvement of the respective parties to which actor particular conduct should be attributed and on what account individuals should be considered to fall within the jurisdiction of Nauru or Australia for the purposes of human rights protection.<sup>97</sup> In general, it can however be observed that Australia exercised exclusive authority over the procedure leading to a decision on resettlement or repatriation, that it financed the operation, and that its officials were present and closely involved in the management of the facility. Further, Australia was the party initiating, organizing and eventually terminating the operation. This direct and decisive involvement of Australia not only opens various avenues for attributing conduct or for establishing derived forms of responsibility as discussed in chapter 3, but is also instructive in the establishment of a sufficiently close 'jurisdictional link' between the migrants and Australia as discussed in chapter 2, either under a reasoning that Australia maintained 'effective control' over the migrants, because the migrants were directly affected by acts of Australian officials, or on account of Australia's involvement in and influence over activities undertaken by other actors, potentially enlivening positive obligations.<sup>98</sup> This does, on the other hand, not preclude the existence of possible concurrent responsibility for wrongful conduct on the side of Nauru.<sup>99</sup>

## 7.6 FINAL REMARKS

This chapter has identified some of the key human rights issues raised by the United States and Australian policies of external processing. By focusing on the two aspects of the procedural and physical exclusion of migrants, the analysis is relevant also for possible future policies embracing the idea of external processing launched by the European Union and/or its Member States.

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tee, 22 May 2006, para. 24.

96 Taylor (2005), p. 14-15. Referring to the management of the centre by IOM, Australia's Immigration Minister Amanda Vanstone reportedly stated: 'They are in charge. It's not in Australian territory, it's on Nauru, and being run by other people. If someone doesn't want to be there, they can go home.' *Tahiti Presse* 17 December 2003, 'Australia: hunger-striking asylum-seekers not our problem, says government'.

97 See, in general, chapter 3.2.3-3.3.

98 Cf. ECtHR 8 July 2004, *Ilascu a.o. v Moldova and Russia*, no. 48787/99, paras. 392-394. See extensively, chapters 2.5.2, 2.5.3, 3.2.2.4.

99 See chapter 3.2.4.1.

It follows from this chapter that, although not necessarily contravening the international refugee law regime, the procedural and physical containment of a specific group of migrants raises issues under more general doctrines of human rights law. The summary conclusion is that the programmes of offshore processing carried out in Nauru, Guantánamo Bay and Christmas Island failed to deliver sufficient guarantees in the sphere of *procedures* and *prospects*: the absence of a legal and procedural framework allowing for the vindication of human rights and the absence of guarantees in the sphere of repatriation or resettlement ultimately allowed for a system where refugees and other migrants were left in a legal vacuum for potentially indefinite duration. Although the US and Australian governments did provide for status determination and eventual removal from the offshore facility, these procedures were not grounded in the law nor subject to independent (or, in the case of Christmas Island: legally enforceable) review.

The conclusion that external processing must more firmly be embedded in a framework of guarantees safeguarding against the arbitrary exercise of state power is much in line with the previous chapter's conclusions on interdictions at sea. Similar to what was said in the context of sea border controls, the key challenge for states wishing to employ policies of offshore processing is to devise such policies in harmony with a meaningful human rights strategy. It follows from this chapter that such a human rights strategy embodies more than a policy of screening for refugees and a search for ad hoc solutions in the event a person is found to be a refugee. Perhaps most crucially, all actions taken in the course of external processing potentially interfering with human rights must be based in the law and must allow for review; and detention may not be maintained beyond what is necessary for status determination or for effectuating a removal.

These requirements may have notable repercussions for the arrangement of programmes of external processing. Especially guarantees of securing release from detention in the absence of prospects of removal compel governments engaged in offshore processing to ensure that alternative solutions for the reception of migrants are put in place. Under the Christmas Island arrangement and the UK New Vision proposal, it is foreseen that those found to be a refugee should be resettled in Australia and the EU Member States respectively.<sup>100</sup> But it may be much more difficult to devise similar guarantees of removal in respect of failed claimants. In view of the often protracted nature of readmission procedures, states may well be confronted with persons whose repatriation to the country of origin cannot be arranged and for whom alternatives must be found. This challenge of putting into place an 'exit strategy' also questions the effectiveness of offshore processing as a temporary solution for the reception of migrants. As the past US and Australian experiences of

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100 A New Vision for Refugees, para. 2.



external processing of asylum-seekers show, the securing of resettlement or readmission into third countries was only partly successful, and a majority of the migrants held in Nauru and all the Cuban migrants held in Guantánamo Bay in the 1990s, were eventually brought to the mainland.

The conclusions of this chapter are premised on the finding that the Australian and US governments exercised *de facto* and *de jure* control over the processing, detention and eventual removal from the facility and that the persons held in the facilities could thus be brought within the personal scope of the respective states' human rights obligations. One may however also imagine situations where external processing merely involves the transfer of persons to such a facility and/or the financing of the facility, but without a further or 'decisive' involvement of the state in the treatment and the determination of protection claims.<sup>101</sup> Examples of such arrangements are the border cooperation agreements between Australia and Indonesia and Papua New Guinea, where the authorities of Indonesia and Papua New Guinea have agreed to intercept irregular migrants thought to be intent on traveling toward Australia and under which the Australian government funds the reception and status determination carried out in those countries.<sup>102</sup> Under these arrangements, it is problematic to identify a clear 'jurisdictional link' between the financing state and the migrants. As submitted in chapter 2, the existence of this link will then depend on the relationship of the state with a particular set of circumstances involving the individual being of such a special nature that the state can be considered to be under a duty to use its influence, knowledge, or other resources at its disposal to prevent the manifestation of human rights violations, provided that the state is indeed legally and factually capable to do so.<sup>103</sup> It is highly unlikely however, that the mere financing of reception and status determination, in the course of which human rights violation incidentally occur, would give rise to the international responsibility of the financing state.

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101 The UK New Vision remained silent on the question whether EU Member State should be directly involved in the operation of Transit Processing Centres. It merely proposed that such centers should be managed by IOM and that screening should occur under the 'approval' of UNHCR; *ibid*, para. 2.

102 For an overview: S. Taylor and B.R. Rafferty-Brown, 'Waiting for Life to Begin: the Plight of Asylum Seekers Caught by Australia's Indonesian Solution', 22 *IJRL* (2010), p. 558-592.

103 See especially chapter 2.5.3. Also see chapter 3.2.2.4.