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State responsibility for international cooperation on migration control: the case of Australia

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This article examines international cooperation on migration control with particular reference to the case of Australia, a state that has entered into a range of migration control and asylum processing arrangements with neighbouring developing countries. The article defines such arrangements, designed to prevent access to asylum, as cooperative non-entrée. *In the past 15 years, Australia has developed a far-reaching cooperative* non-entrée *regime with countries of origin and transit. These extraterritorial cooperation arrangements challenge the reach of human rights and refugee law. The article considers two avenues to hold Australia internationally responsible for human rights and refugee law violations in the course of cooperative non-entrée practices, namely extraterritorial human rights jurisdiction and complicity under the law of State Responsibility. The article concludes that despite the extraterritorial and international character of cooperative non-entrée, Australia is not beyond the reach of international law.*

Introduction

Developed states are increasingly projecting migration control measures beyond their borders through cooperation with developing states to prevent asylum seekers accessing their territory (Gammeltoft-Hansen and Hathaway 2014). Such migration control arrangements are increasingly complex, often involving cooperation between both states and non-state actors (Gammeltoft-Hansen 2011). In the European context, the Italy–Libya Treaty of Friendship, Partnership and Cooperation, mandating a range of measures in relation to irregular migration, is perhaps the most clear-cut example (Giuffre 2013). Recent developments in bilateral cooperation between Spain and Senegal and Mauritania (FRA 2012), for example, and the European Union and Turkey deal signed in November 2015 show that cooperation-based migration control is on the rise.

These policies significantly challenge the existing refugee and human rights protection regime, still largely tied to notions of territory and single state responsibility. How do international law norms apply to international cooperation in the field of migration control and asylum processing (den Heijer 2012)? How does international law hold two or more states jointly responsible for treatment of asylum seekers (Nollkaemper and Plakokefalos 2014)?

This article analyses the case of Australia, a state that has led the way in preventing asylum seeker arrivals in the past 15 years (Magner 2004, McAdam 2013). Australia has sought to stem the flow of asylum seekers arriving by boat by entering into a range of *migration control* arrangements with regional states such as Sri Lanka, Malaysia and Indonesia. Australia has also established offshore *asylum processing* agreements, under which asylum

seekers are transferred to Papua New Guinea and Nauru for processing. Most recently, Australia has signed a deal with Cambodia to permanently resettle refugees in that country.[1]

Measures to deter or prevent asylum seekers seeking protection are nothing new. Since the 1980s, developed states have taken measures to keep asylum seekers from accessing their territory, jurisdiction and asylum procedures' (Hathaway 1992, Vedsted-Hansen 1999). However, in the past these efforts have been undertaken unilaterally by individual states. The defining feature of the migration control arrangements discussed in this article is the international cooperation component, whereby a state – in this case, Australia – undertakes extraterritorial measures in cooperation with another state – for example, Papua New Guinea – to prevent access to asylum in the first state. I define this form of state cooperation to prevent access to asylum as 'cooperative non-entrée'.

The international element of cooperative non-entrée is significant because it raises questions about the division of responsibility between states. At the level of general international law, state responsibility is receiving increasing scholarly attention (Aust 2011, Nollkaemper and Plakokefalos 2014). In such complex scenarios the attribution of responsibility to one state is often problematic, and not necessarily desirable (Nollkaemper and Jacobs 2013). While such migration control policies challenge the reach of international law, extraterritorial human rights jurisdiction (Milanovic 2008) and the general international law doctrine of State Responsibility may meet this challenge (ILC 2001).

The purpose and structure of this article is threefold: firstly, the article defines the phenomenon of cooperative non-entrée. Secondly, it outlines Australia's cooperation arrangements with regional states to prevent access to asylum. Thirdly, the article raises the international law questions cooperative non-entrée poses and offers avenues for establishing responsibility, namely extraterritorial human rights jurisdiction and complicity under the law of State Responsibility. The article concludes that despite the extraterritorial and international character of its cooperative non-entrée regime, Australia is not beyond the reach of international law.

What is cooperative non-entrée?

Hathaway first coined the term 'non-entrée' in 1992 to refer to the 'array of legalized policies adopted by states to stymie access by refugees to their territories (Hathaway 1992:41-42, Hathaway 2005:291). Classical non-entrée may encompass actions on the territory of the receiving state (for example, readmission agreements) as well as extraterritorial measures (for example, pushbacks on the high seas). Vedsted-Hansen and Noll defined 'non-arrival' as extraterritorial migration control wherein the asylum seeker is prevented from stepping foot on the territory of the acting state, thereby 'operating as barriers for asylum-seekers to access a jurisdiction where they could seek protection' (1999:382). However, non-entrée remains the predominant term used in the literature to refer to both territorial and extraterritorial measures. (Non-entrée should not be confused with 'non-admission' policies, which seek to screen out asylum seekers on the basis of restrictive criteria for protection.)

Existing scholarly work evaluates the spectrum of *unilateral* migration control measures undertaken by developed states over the past 30 years, including visa controls (Vedsted-Hansen 1999); carrier sanctions (Nicholson 2011, Cruz 1995); establishment of so-called 'international zones' (Hughes and Liebaut 1998); excision of territory for the purposes of

[1] The human rights and refugee law implications of this agreement are not dealt with in this article.

migration (Magner 2004); and interdiction on the high seas (Legomsky 2006). However, little existing literature deals with cases of *cooperative* migration control, a phenomenon Gammeltoft-Hansen and Hathaway recently referred to as 'complex deterrence' (2014).

Cooperative non-entrée encompasses both bilateral and multilateral measures. Bilateral arrangements involve two states, for example the Australia–Indonesia Regional Cooperation Model (RCM) (Jesuit Refugee Service 2012, Crock and Ghezelbash 2010). Multilateral measures involves more than two states, such as the Bali Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, initiated in 2002 (the Bali Process), which brings together 38 source, transit and receiving states throughout the region (Mann 2013). For the purposes of this article, I focus on Australia's bilateral cooperation arrangements.

The *locus* of cooperative non-entrée is extraterritorial (from the point of view of the developed state), and limited to measures carried out on the high seas or within the territories of cooperating states. While at the conceptual level cooperative non-entrée may encompass migration control by air or land (for example, the posting of airline liaison officers, (see den Heijer 2012:125-32)), this article confines itself to the methods by which Australia seeks to prevent asylum seekers arriving by boat.

Cooperative non-entrée includes both formal and informal migration control arrangements. Formal cooperation is action under an international agreement between the two states, for example Australia's regional resettlement agreements with Papua New Guinea and Nauru. Informal cooperation relates to actions forming part of the broader bilateral relationship, for example Australian assistance to Sri Lanka to prevent asylum seeker boats leaving that country (MFA 2012).

Thus, cooperative non-entrée may be conceptualised as extraterritorial measures undertaken by a developed state in cooperation with a developing state to prevent access to asylum in the first state. While cooperative non-entrée could be initiated by developing states in what has been termed 'mimicry' (Gammeltoft-Hansen 2010), in practice it is developed states who have the resources to carry out the practice. The article now turns to an empirical account of Australian-led cooperation efforts with countries of origin and transit in the field of migration control and asylum processing.

The case of Australia

Australia attempts to prevent access to asylum on its territory through these six bilateral arrangements, which form a highly developed regime. Since the turn of the century Australia has called on regional states to prevent asylum seekers accessing its territory by boat (Magner 2004:82). Successive governments have gone to great lengths to 'stop the boats'. Simultaneously, Australia seeks to avoid jurisdiction over and responsibility for the individuals concerned. The article now turns to a mapping of Australia's cooperation agreements to prevent asylum seekers access its territory.

Sri Lanka is the only country of origin with which Australia cooperates to prevent asylum seekers departing its shores. Australia–Sri Lanka cooperation is informal in nature, forming one part of the broader bilateral relationship. Sri Lankan asylum seekers seek protection following a protracted civil war that came to an end in 2009. Allegations of war crimes and crimes against humanity exist on both sides of the conflict (HRLC 2014:3). Australia provides surveillance, electronic and search and rescue equipment and training to expand Sri

Lanka's capacity to target smuggling operations (HRLC 2014:3). Australia also provides funding to the Sri Lankan navy every year (HRLC 2014: 3). Under its current border security policy, Operation Sovereign Borders, Australia also intercepts and pushes back boats to Sri Lanka (Medhora and Doherty 2015).

Indonesia is a key transit country for asylum seekers and refugees (Howard 2003; UNODC 2011:18-19) on a path between source countries in the Middle East and Asia to Australia (Nethery *et al* 2012:94). The number of asylum seekers and refugees in Indonesia has increased in the last five years to around 10,000. While Indonesia is not a party to the Refugee Convention, it has historically tolerated the presence of irregular migrants (Towle 2006). Cooperation includes Australian funding of the Jakarta Centre for Law Enforcement Cooperation (Gammeltoft-Hansen and Hathaway 2015:235-284), where Australian police train their Indonesian counterparts on the investigation and disruption of people smuggling operations. Australia also stations customs and border protection officers in Indonesia to 'coordinate efforts to prevent and disrupt maritime people smuggling' (Spinks *et el* 2013:23). Since 2013, Australia has pushed back boats to Indonesia despite the protests of the Indonesian government (Medhora and Doherty 2015).

In July 2011 the Australian government entered into a non-binding political agreement with Malaysia to swap 800 asylum seekers in exchange for resettling 4000 refugees. The 4,000 refugees were to be resettled in Australia over a four-year period, with that country bearing the cost of their transfer and settlement. Like Indonesia, Malaysia is a transit country that has not signed the Refugee Convention, nor other key international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) or the Convention against Torture (CAT). The deal was defeated by Australia's High Court in the case of *M70* (*M70 v. Minister for Immigration and Citizenship*, 244 CLR. 144 (2011)) on the basis that there were inadequate legal guarantees that refugees in Malaysia would receive the protection required by the Australian *Migration Act 1958*.

Moving from transit states to asylum processing states, Australia's cooperation with Nauru on migration control dates back to the infamous Tampa incident in 2001 (Schloenhardt 2002:54–73). In August of that year, the Norwegian freight ship MV Tampa rescued 438 asylum seekers on their way Australia. The Australian government refused to allow the ship to dock, requesting it return them to Indonesia. Australia asked the microstate of Nauru, a former trust territory, to accept the asylum seekers (Magner 2004:82), triggering the establishment of the Pacific Solution. At the time, Nauru was not a party to the Refugee Convention. Under this policy, which lasted until 2008, asylum seekers bound for Australia were intercepted and detained on Nauru while their protection claims were processed. Similarly, former Australian colony Papua New Guinea agreed to house asylum seekers under the Pacific Solution in exchange for increased levels of aid. States such are heavily reliant on Australian development assistance.

In 2012, Australia resumed transferring asylum seekers to offshore detention centres under new deals with both Nauru (by then a party to the Refugee Convention) and Papua New Guinea. In separate agreements, Australia formalised cooperative non-entrée arrangements with these two developing states. Both arrangements are financed entirely by Australia (PNG Agreement Clause 9, Nauru Memorandum Clause 6) and Australia funds and coordinates the provision of services by contractors at the detention centres. The key distinction characterising this cooperation from the Pacific Solution is that both deals go beyond the processing of asylum claims to include the possibility of permanent resettlement in Nauru

and Papua New Guinea (PNG Agreement Clause 5, Nauru Memorandum Clause 12). Conditions in detention are deeply problematic. On Nauru, an Australian government report found evidence of sexual assault suffered by asylum seekers in detention, while in Papua New Guinea two asylum seekers have died – one killed by staff during a protest and the other due to insufficient medical care (Cornell 2014:67, Australian Senate 2015 para 2.53).

In 2014 Australia entered into an ambitious four-year refugee resettlement deal with Cambodia. In exchange for A$40 million development assistance, Cambodia offers permanent resettlement to people found to be refugees on Nauru (Cambodia Memorandum Clause 4(a)). Cambodia is a party to the Refugee Convention but also a developing country with limited experience in refugee resettlement. Thus far just five refugees have been transferred from Nauru to Phnom Penh under the deal.

At the multilateral level, Australia is chair of the Bali Process, a regional multilateral forum with a focus on migration control and border security. The Bali Process agenda is dominated by issues such as 'enhanced regional cooperation, including extradition of people smugglers and traffickers, [to] help dismantle criminal networks and reinforce regional efforts to counter the illegal trade in persons' (Co-Chairs' Statement 2009, Kneebone 2014).

A challenge to the reach of refugee and human rights law

It is clear that cooperative non-entrée poses significant challenges to the application and efficacy of human rights and refugee law. Cooperation is carried out on the high seas or the territory of third states in an attempt to avoid the reach of both domestic and international law (Gammeltoft-Hansen and Hathaway 2014). While Australia's cooperation arrangements give rise to a litany of human rights issues, this article focuses on three possible violations of human rights and refugee law flowing from Australia's obligations as a party to the Refugee Convention, ICCPR and CAT.[2]

Firstly, turn-backs to transit countries like Indonesia may violate the principle of *non-refoulement*, by exposing asylums seekers to the risk of onward return, or 'chain' *refoulement* (Taylor and Rafferty-Brown 2010:156). *Non-refoulement* is the cardinal refugee law principle, set out in Article 33 of the Refugee Convention, as well as a human rights law norm drawn from Article 3 CAT and Article 7 ICCPR (HRLC 2014:53). The principle is widely accepted to be customary international law.

Secondly, cooperative non-entrée in the form of asylum processing on Nauru and Papua New Guinea may amount to arbitrary detention in violation of Article 9(1) of the ICCPR. Currently, 1579 men, women and children are detained offshore in detention camps (DIBP 2015). The average time in detention is 415 days (DIBP 2015).

Thirdly, the offshoring of asylum processing on Nauru and Papua New Guinea may amount to torture or other cruel, inhuman or degrading treatment or punishment under Articles 3 and 16 of CAT. In its recent concluding observations on Australia, the Committee Against Torture found that the conditions of 'overcrowding, inadequate health care; and even allegations of sexual abuse and ill-treatment' cause 'serious physical and mental pain and suffering' (CAT 2015 para 17).

[2] Australia is also a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC), however this article confines itself to consider obligations to asylum seekers flowing from the Refugee Convention, ICCPR and CAT.

This article now evaluates whether international law can hold Australia accountable for its cooperative non-entrée policies. The article explores two possibilities: extraterritorial jurisdiction under human rights and refugee law and complicity under the law of State Responsibility.

Extraterritorial Jurisdiction

As a party to the Refugee Convention, ICCPR and CAT, Australia has certain obligations to all persons under its jurisdiction. Historically, jurisdiction is tied to territory in international law. Cooperative non-entrée arrangements seek to obfuscate responsibility for human rights and refugee law violations by physically removing the *locus* of activities outside Australian territory. To establish jurisdiction in the context of cooperative non-entrée, therefore, Australia's treaty obligations must stretch beyond its territory to the high seas and the territory of other states.

The Refugee Convention has a rather complex gradation of rights based on the refugee's level of attachment to the host state (Hathaway 2005:154). A limited number of rights, including *non-refoulement*, accrue at the minimum level of attachment; that is, where a person is under a host state's jurisdiction. The territorial scope of the principle of *non-refoulement* under refugee law is not settled law, though today there is consensus that the principle of *non-refoulement* applies extraterritorially, in light of key decisions of the European Court of Human Rights (see for example *Hirsi Jamaa and Others v. Italy*, Appl. no 27765/09, 22 February 2012), notwithstanding the narrow interpretation of the principle undertaken by American Supreme Court in the case of *Sale* (*Sale, Acting Commissioner Immigration and Naturalization Service v. Haitian Center Council*, 113 S.Ct. 2549, 509 US 155 (1993), 21 June 1993). As de Boer recently noted, 'most international lawyers will agree that Article 33 of the Refugee Convention [is] applicable as long as the state exercises jurisdiction' (2014: 121).

At the level of human rights law, Article 2(1) of the ICCPR requires Australia to respect and ensure the rights of 'all individuals within its territory and *subject to its jurisdiction*' (emphasis added). The Human Rights Committee has interpreted Article 2 to require that: 'a State party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party' (emphasis added)(HRC 2004 para 10, Milanovic 2008:413, Nowak 2005:43-45, Dastyari and Penovic 2014:2). The Committee has further stated that Covenant rights extend to 'to all individuals, regardless of nationality… such as asylum seekers [and] refugees' (HRC 2004 para 10). It then follows that if individuals are not subject to Australia's jurisdiction when turned back on the high seas or when detained in PNG or Nauru, Australia will not be responsible for any violations of the Covenant (McGoldrick 2004:47).

The CAT also applies extraterritorially to any territory under Australia's jurisdiction (Milanovic, 2008:414). In *JHA v Spain* (CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), 21 November 2008 para 8.2), the Committee Against Torture recalled its General Comment 2, stating:

> the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure or de facto effective control*, in accordance with international law. In particular, it considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in

> detention. (emphasis added)

Whether a State exercises a sufficient level of control to incur legal responsibility turns on the facts. Jurisprudence of the European Court of Human Rights (ECtHR), while not binding on Australia, offers influential guidance. The ECtHR has held that the European Convention on Human Rights (ECHR) applies extraterritorially where a State 'exercises control and authority over an individual' (*Al Skeini and Others v. the United Kingdom*, Appl. no 55721/07, 7 July 2011 para 137) or control over territory (*Loizidou v. Turkey*, (40/1993/435/514) 23 European Court of Human Rights, 513 18 December 1996).

States cannot avoid responsibility under human rights treaties on the basis of other, bilateral agreements. In the case of *Hirsi Jamaa v Italy* (App No 27765/09, European Court of Human Rights, Grand Chamber, 23 February 2012) Italian authorities pushed back Somali and Eritrean nationals to Tripoli under a bilateral arrangement with Libya. The ECtHR pointedly observed:

> Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols (para 129).

In the present context, it is arguable that Australia has the requisite level of effective control over persons or territory in Papua New Guinea and Nauru to trigger human rights jurisdiction (under the ICCPR or CAT). Australia exercises a significant level of control over staffing, funding, and operations at the Nauru and Papua New Guinea detention centres (Legal and Constitutional Affairs References Committee 2014 para 7.31). Australia selects who is to be transferred to the Centre and acknowledges that asylum seekers are under its jurisdiction prior to being transferred. Perhaps more fundamentally, the very existence of the centres is dependent on Australia. An Australian Senate inquiry found:

> the degree of involvement by the Australian Government in the establishment, use, operation, and provision of total funding for the [Papua New Guinea] centre clearly satisfies the test of effective control in international law, and the government's ongoing refusal to concede this point displays a denial of Australia's international obligations (Legal and Constitutional Affairs References Committee 2014 para 8.33).

While Australia acknowledges the extraterritorial effect of the human rights treaties (Parliamentary Joint Committee on Human Rights 2013 para 2.16), the government denies jurisdiction over the detention centres in Papua New Guinea and Nauru, stating that Australian involvement 'does not constitute the level of control required under international law to engage Australia's international human rights obligations extraterritorially' (Legal and Constitutional Affairs References Committee 2014 para 7.29). Whether Australian influence over offshore detention centres amounts to the degree of 'effective control' required demands judicial attention; however recent concluding observations by the Committee Against Torture on Australia tend towards a finding of jurisdiction:

> All persons who are under the effective control of the State party, because *inter alia* they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the Convention (Committee Against Torture 2014 para 17)

However, other aspects of Australia's cooperative non-entrée arrangements fall outside the scope of extraterritorial jurisdiction, for example provision of funding, training, or the provision of equipment for the purposes of migration control. In these cases, the requisite level of control is simply not reached, as the state has no control over persons or territory. Rather, Australia's role is one of aiding and assisting a third state in the prosecution of migration control measures.

Complicity

At the level of general international law there exists a set of rules that outline how state responsibility may be established for international wrongful acts. These rules are contained in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ASR). Under Article 2 ASR, there are two elements of an internationally wrongful act. The first is attribution: the act must be attributable to the state under international law. The second is that the act must be a 'breach of an international obligation' in force for the State at the time of the breach (ILC 2001:34).

The ASR are soft law not hard law, though some elements codify norms of customary international law. Complicity is one such binding norm, as stated by the International Court of Justice in the *Genocide Case* (*Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. International Court of Justice. 26 February 2007, para 173). The rule is expressed in Article 16:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.

Article 16 does not cover attribution as the state does not itself carry out the internationally wrongful act (Giuffre 2013:725). In the present case, the law of complicity may hold Australia, 'the assisting state', internationally responsible for aiding or assisting 'the acting state' in the commission of an internationally wrongful act such as violation of the principle of *non-refoulement*.

There seems little doubt that *refoulement* amounts to an 'internationally wrongful act' for the purposes of the ASR. In the Australian context, turn-backs to transit countries like Indonesia may result in chain *refoulement* (Taylor and Rafferty-Brown 2010:146, Amnesty International 2008), while turn-backs to origin states such as Sri Lanka may directly violate the principle (HRLC 2014:54). The key question then becomes whether Australia can be held responsible as the assisting state for internationally wrongful acts committed extraterritorially by third states.

Article 16 contains three elements that determine the scope of responsibility of the assisting state: awareness of the circumstances of the act; knowledge of the act with a view to its commission; and that the act must be 'wrongful had it been committed by the assisting State itself' (ILC 2001:66). Aid and assistance need not be 'essential to the performance of the internationally wrongful act', but it must contribute significantly to the act. The

Commentaries to the ILC Articles include 'financing of the activity in question' as an example of conduct meeting the requirements of Article 16 (2001:66). The law of complicity is in a process of development.[3] While it is clear that Article 16 ASR amounts to a binding international law norm, interpretation of the knowledge requirement on the part of assisting states has yet to receive significant judicial attention.

Conclusions

This article has staked a claim for the carving out of a definition of cooperative non-entrée: extraterritorial measures undertaken by a developed state in cooperation with a developing state to prevent access to asylum in the first state. The international element of cooperative non-entrée raises questions about the division of responsibility between states for violations of human rights and refugee law. The article has taken the case of Australia to illustrate the architecture of perhaps the most developed cooperative non-entrée regime in the world, though the phenomenon is by no means confined to Australia. These issues are timely to consider in the context of Europe's response to the current refugee crisis.

The article has briefly pointed to three of the human rights and refugee law issues cooperative non-entrée gives rise to, namely *non-refoulement*, arbitrary detention and torture or other cruel, inhuman or degrading treatment or punishment. The article has put forward two possible avenues for holding developed states – in this case, Australia – to account. The ICCPR and CAT apply where Australia has 'effective control' over persons or territory in cooperating states. However, this form of jurisdiction is unlikely to extend to include mere funding or the delivery of training or equipment.

The law of State Responsibility rule complicity may hold Australia responsible for aiding and assisting another state in carrying out international wrongful acts that violate human rights and refugee law in the course of cooperative non-entrée measures. Clearly, not all forms of cooperation will meet the threshold of complicity – where exactly this line is drawn requires further research and judicial attention. However, despite the extraterritorial and international character of its cooperative non-entrée regime, Australia is not beyond the reach of international law.

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[3] For an extensive exploration of Complicity in the context of the law of State Responsibility, see Aust 2011.

AMNESTY INTERNATIONAL (2008). *Indonesia: Briefing to the UN Committee Against Torture* (15 April).

ARRANGEMENT BETWEEN THE GOVERNMENT OF AUSTRALIAN AND THE GOVERNMENT OF MALAYSIA ON TRANSFER AND RESETTLEMENT (2011).

AUST, H. P. (2011). *Complicity and the Law of State Responsibility*, Cambridge.

AUSTRALIAN SENATE Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru. 2015. *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* 31 August. Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report (accessed 22 September 2015).

CASTAN CENTRE FOR HUMAN RIGHTS LAW, 'Submission to the Senate Legal and Constitutional Affairs References Committee' May 2014.

COMMITTEE AGAINST TORTURE (2007). General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4

COMMITTEE AGAINST TORTURE (2014). Concluding observations on the fourth and fifth periodic reports of Australia (CAT/C/AUS/4-5) at its 1260th and 1263th meetings, held on 10 and 11 November 2014 (see CAT/C/SR.1260 and 1263), and adopted at its 1284th and 1285th meetings, held on 26 November.

CORNELL, R. (2014). *Review into the events of 16-18 February 2014 at the Manus Island regional processing centre,* 23 May.

CROCK, M. & GHEZELBASH, D. (2010). Do Loose Lips Bring Ships-The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals. *Griffith L. Rev.,* 19, 238.

CRUZ, A. (1995). *Shifting Responsibility: Carriers' liability in the Member States of the European Union and North America,* Trentham.

DE BOER, T. (2014). Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection. *Journal of Refugee Studies,* 28, 118-134.

DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION (2015). 'Immigration Detention and Community Statistics Summary' 31 July. Available at http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-July-2015.pdf#search=immigration%20detention%20statistics%20july%202015 (accessed 21 September 2015).

DASTYARI, A. and **PENOVIC, T.** (2014). Submission to the 'Legal and Constitutional Affairs References Committee Inquiry into the incident at the Manus Island Detention Centre from 16 February to 18 February 2014.

DEN HEIJER, M. (2012). *Europe and extraterritorial asylum,* Bloomsbury Publishing.

FRA. 2012. *Fundamental Rights at Europe's Southern Sea Borders*

GAMMELTOFT-HANSEN, T. (2011). *Access to Asylum: International refugee law and the globalisation of migration control,* Cambridge University Press.

GAMMELTOFT-HANSEN, T. and **HATHAWAY, J. C.** (2014). Non-Refoulement in a World of Cooperative Deterrence. *Columbia Journal of Transnational Law,* 53, 235.

GAMMELTOFT-HANSEN, T. (2010). The externalisation of European migration control and the reach of international refugee law. *European Journal of Migration and Law.*

GIUFFRE, M. (2013). State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya? *International Journal of Refugee Law,* 24, 692-734.

HATHAWAY, J. C. (1992). The emerging politics of non-entree. *Refugees,* 91, 40-41.

_____ (2005). *The Rights of Refugees under International Law,* Cambridge University Press.

HOWARD, J. (2003). 'To Deter and Deny: Australia and the Interdiction of Asylum Seekers' 21(4) *Refuge* 35.

HRC 2004. Human Rights Committee, General Comment No 31 Nature of the General Legal Obligation Imposed on State Parties to the Covenant: UN Doc CCPR/C/21/Rev1/Add.13 (26 May)

HRLC 2014. Human Rights Law Centre, Can't Flee, Can't Stay: Australia's Interception and Return of Sri Lankan Asylum Seekers, available at http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf (accessed 21 September 2015).

ILC (2001). Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: http://www.refworld.org/docid/3ddb8f804.html (accessed 15 September 2015).

JAKARTA CENTRE FOR LAW ENFORCEMENT COOPERATION, *Annual Report 2013*.

JESUIT REFUGEE SERVICE (2012). The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines.

J.H.A. v. SPAIN 2008. CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), 21 November, available at: http://www.refworld.org/docid/4a939d542.html (accessed 22 September 2015)

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE 2014. 'Incident at the Manus Island Detention Centre from 16 February to 18 February 2014' December.

LEGOMSKY, S. H. (2006). The USA and the Caribbean Interdiction Program. *International Journal of Refugee Law*, 18, 677-695.

MAGNER, T. (2004). A less than 'Pacific'solution for asylum seekers in Australia. *International Journal of Refugee Law*, 16, 53-90.

MCADAM, J. (2013). Australia and Asylum Seekers. *International Journal of Refugee Law*, 25, 435-448.

MCGOLDRICK, D. (2004). Extraterritorial Application of the International Covenant on civil and political Rights. *Extraterritorial Application of Human Rights Treaties,* 1**,** 41.

MEMORANDUM OF UNDERSTANDING BETWEEN THE REPUBLIC OF NAURU AND THE COMMONWEALTH OF AUSTRALIA (2013) relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues. Available at http://dfat.gov.au/geo/nauru/pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx (accessed 16 September 2015).

MFA Australian Minister for Foreign Affairs media release, 'Australia-Sri Lanka talks: Four-point plan to fight people smuggling', 17 December 2012. Available at http://foreignminister.gov.au/releases/2012/bc_mr_121217.html (accessed 20 April 2015).

MEDHORA, S. and **DOHERTY, B.** (2015). 'Australia confirms 15 boats carrying 429 asylum seekers have been turned back'. The Guardian, 28 January. available at http://www.theguardian.com/australia-news/2015/jan/28/australia-confirms-15-boats-carrying-429-asylum-seekers-have-been-turned-back (accessed 10 March 2015).

MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE KINGDOM OF CAMBODIA AND THE GOVERNMENT OF AUSTRALIA, relating to the Settlement of Refugees in Cambodia. 2014. available at http://dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Documents/cambodia-australia-mou-and-operational-guidelines.pdf

(accessed 21 April 2015).

MANN, I. (2013). Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013. *Harvard International Law Journal* 54.2.

MILANOVIC, M. (2008). From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties. *Human Rights Law Review*, 8, 411-448.

_____ (2008). From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties. *Human Rights Law Review*, 8**,** 411-448.

NETHERY, A., RAFFERTY-BROWN, B. and **TAYLOR, S.** (2012). 'Exporting Detention: Australia-funded Immigration Detention in Indonesia' 87 Journal of Refugee Studies 88.

NICHOLSON, E. T. (2011). *Cutting Off the Flow: Extraterritorial Controls to Prevent Migration,* Berkeley Law Issues Brief.

NOLLKAEMPER, A. and **JACOBS, D.** (2012). Shared Responsibility in International Law: A Conceptual Framework. *Mich. J. Int'l L., 34*, 359.

NOLLKAEMPER, A. and **PLAKOKEFALOS, I.** (2014). *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, Cambridge University Press.

NOWAK, M. (2005). *Covenant on Civil and Political Rights, CCPR Commentary*, NP Engel.

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS (2014). 'Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 9 – 12 December 2013; Legislative Instruments Received 23 November 2013– 31 January 2014' (Second Report of the 44th Parliament, February 2014).

REGIONAL RESETTLEMENT ARRANGEMENT BETWEEN AUSTRALIA AND PAPUA NEW GUINEA (2013). Available at http://dfat.gov.au/geo/papua-new-guinea/Documents/regional-resettlement-arrangement-20130719.pdf (accessed 16 September 2015).

SCHLOENHARDT, A. (2002_. 'Detention, Deterrence and Denial: Asylum Seekers in Australia' 22 University of Queensland Law Journal 54-73.

SPINKS, H., BARKER, C. and **WATT. D.** (2013). 'Australian Government spending on irregular maritime arrivals and counter-people smuggling activity' Parliamentary Library (Australia) 4 September, Table 8, page 23.

TAYLOR, S. and **RAFFERTY-BROWN, B.** (2010). Difficult Journeys: Accessing Refugee Protection in Indonesia. *Monash University Law Review,* 36, 138-161.

TOWLE, R. (2006). Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing? *International Journal of Refugee Law,* 18, 537-570.

UNODC (2011). Smuggling of migrants by sea, Issue paper.

VEDSTED-HANSEN, J. C. (1999). Europe's response to the arrival of asylum seekers: refugee protection and immigration control. *Refugee Research*.

VEDSTED-HANSEN, J. C. and **NOLL, G.** (1999). 'Non-communitarians: refugee and asylum policies'. In Alston, P., Bustelo, M. R., & Heenan, J. (eds) *The EU and Human rights*, Oxford: Oxford.

WHYTE, S. (2015). 'Government spends $1.2 billion on offshore processing centres in one year'. Sydney Morning Herald, 5 February. available at http://www.smh.com.au/federal-politics/political-news/government-spends-12-billion-on-offshore-processing-centres-in-one-year-20150205-13708n.html (accessed 18 April 2015).