The Failure of Domestic and International Mechanisms to Redress the Harmful Effects of Australian Immigration Detention

Adrienne D. McEntee

Follow this and additional works at: https://digitalcommons.law.uw.edu/wilj

Part of the Comparative and Foreign Law Commons, and the Immigration Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wilj/vol12/iss1/13

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
THE FAILURE OF DOMESTIC AND INTERNATIONAL MECHANISMS TO REDRESS THE HARMFUL EFFECTS OF AUSTRALIAN IMMIGRATION DETENTION

Adrienne D. McEntee†

Abstract: Australia's Migration Act explicitly permits the government to detain non-citizens seeking entry without visas, including those who request asylum. Detainees wait up to five years for their immigration claims to be processed in detention centers managed by Australasian Correctional Management ("ACM"), a subsidiary of U.S. corporation Wackenhut Corrections. Arriving asylum-seekers often suffer the lasting effects of torture, threats of death, and other traumatic conditions—effects that are exacerbated by detention conditions. This Comment emphasizes detention's effects on children, who suffer health and other problems while detained. Detainees, Australian citizens, and overseas commentators are now protesting against the detention policy. The government's response has been unsympathetic and legal challenges have been largely eliminated by Migration Act amendments that have virtually foreclosed judicial review. Further, while international claims are possible under treaties to which Australia is a party, such as the Convention on the Rights of the Child ("CRC"), they are generally difficult to enforce. Even the Alien Tort Claims Act ("ATCA"), which grants jurisdiction to United States Federal District Courts over international claims by foreign citizens, fails to offer redress for torts endured while in immigration detention, despite a recent development from the Ninth Circuit that further extends the ATCA's reach over multinational corporations. The ATCA remains ineffective because of difficulties in holding the U.S. parent, Wackenhut, liable for the actions of its foreign subsidiary, the detention management firm, ACM.

I. INTRODUCTION

Help me please. I want a home. I want freedom.... Two years I stay here and everybody is crazy.... I'm very sad. I can't do anything. In the compound there is nothing to do.... We see all sad and crying. I see three lady in my compound sewing her mouths....

These are the cries of only some of the 4892 children being held in

---

† The author wishes to thank Professor Veronica Taylor and Professor Joan Fitzpatrick for their advice, comments, and encouragement. The author would also like to thank the Pacific Rim Law & Policy Journal Editorial Staff for their support.


2 Bob Burton, Australia: Rift In Official's Family Spotlights Asylum Controversy, INTER PRESS SERVICE, Sept. 17, 2002, LEXIS, News Library. This number reflects the number of children held in Australian detention centers as of July 2002. Id.
Australian detention centers. These children entered Australia as non-citizens and now await initial refugee claims decisions, appeals of rejected claims, or deportation. Australia’s mandatory detention policy for non-citizens is not new. Nor is the country’s detention of children. What is new is the collective response by academics, human rights groups, and the public to the mandatory detention of child refugees, and the government’s reaction to this criticism. Moreover, the Australian situation presents new challenges for obtaining legal redress because Australian immigration detention centers are run by an Australian subsidiary of a U.S. corporation under contract with the Department of Immigration.

Part II of this Comment outlines Australia’s detention policy. Part III addresses the conditions of the detention centers, focusing on their effect on children. Part IV discusses official criticisms of the policy, social responses by activists and detainees, and the government’s reactions to recent protests. Part V discusses domestic and international legal attempts to redress detention harms. Finally, Part VI examines the use of a U.S. statute—the Alien Tort Claims Act (“ATCA”)—to pursue human rights violations against children in the immigration detention context. Part IV also includes an overview of the Ninth Circuit’s new standard for holding corporations liable for human rights abuses. This Comment argues that in spite of the Ninth Circuit’s more inclusive standard under the ATCA for holding corporations liable for aiding and abetting human rights abuses, the ATCA remains ineffective in redressing human rights violations in the privatized immigration context. Roadblocks remain that prevent the ATCA from being used to hold parent corporations liable for the actions of foreign subsidiaries.

II. AUSTRALIA’S POLICY OF DETENTION

The Migration Act compels the detention of non-citizens who enter Australia’s borders. This group includes persons who seek asylum because

---

3 Natasha Bita, UN Condemns Our Detention Policy, AUSTRALIAN, July 29, 2002, LEXIS, News Library.
4 Id.
6 Nick Taylor, Tide of Despair, ABIX: AUSTRALASIAN BUS. INTELLIGENCE, June 3, 2001, LEXIS, News Library. Australasian Correctional Management (“ACM”) is a subsidiary of Wackenhut Corrections, a U.S. corporation that operates prisons. Id.
7 It is mandatory and in the national interest to detain every unlawful non-citizen in immigration detention until the designated person either leaves Australia or is granted a visa. See Migration Act, 1958, §§176, 189 and 196 (Austl.) [hereinafter Migration Act].
they fear persecution in their countries of origin.\textsuperscript{8} Often, such asylum-seekers request assistance from people-smugglers to enter Australia, and frequently must do so via substandard boats.\textsuperscript{9} Regardless of method of entry, Australia is bound under international law to provide asylum to those persons who meet the international definition of refugee.\textsuperscript{10}

Despite Australia's international obligations, its national immigration laws delay or hinder entry of asylum-seekers. The Migration Act empowers the Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") Minister to establish and maintain detention centers to hold asylum-seekers until their refugee claims are processed.\textsuperscript{11} There are six established detention facilities and plans are underway for four more.\textsuperscript{12} Management of these centers is contracted out by DIMIA to a private company, Australasian Correctional Management ("ACM"), the wholly owned subsidiary of U.S. based Wackenhut Corrections Corporation.\textsuperscript{13}

\begin{footnotes}
\item[Mary Crock and Ben Saul, Future Seekers: Refugees and the Law in Australia 4 (2002).]
\item[For an extended analysis of treatment of boat people by the Australian government, see Emily C. Peyer, Comment, "Pacific Solution"? The Sinking Right to Seek Asylum in Australia, 11 Pac. Rim L. & Pol'y J. 431 (2002); and Jessica E. Tauman, Comment, Rescued at Sea, But Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis, 11 Pac. Rim L. & Pol'y J. 461 (2002).]
\item[Migration Act, §§ 272 and 273. Those who are unsuccessful on their asylum claims are denied permanent residence and deported. Id. § 181. Even unauthorized arrivals who are successful in their applications for refugee status are not entitled to permanent residence because of 1991 legislation introducing three-year "temporary visas." Guy S. Goodwin-Gill, Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection 23 (UNHCR Global Consultations 2001), available at http://www.unhcr.ch (last visited Jan. 17, 2003).]
\item[Detention facilities include Immigration Detention Centers (IDCs) and Immigration Reception and Processing Centers (IRPCs). Department of Immigration and Multicultural and Indigenous Affairs, Australian Immigration Fact Sheet 82: Immigration Detention, at http://www.immi.gov.au/facts/82detention.htm (last modified Sept. 10, 2002) [hereinafter Fact Sheet 82]. IDCs are used primarily to detain overstayers or people who have breached visa conditions. Facilities are located at Villawood, Maribyrnong and Perth. IRPCs are set aside for unauthorized boat arrivals. These centers are located at Port Hedland, Curtin and Woomera. New facilities are to be established at Darwin, Singleton and Port Augusta. An additional center at Brisbane has been budgeted for and plans have been announced. Id. For purposes of this Comment, all such facilities will be referred to as detention centers.]
\item[Tim Lemke, U.S. Firm Pioneers Prisons Industry with Global Reach; Wackenhut Runs 36 U.S. Facilities and 19 Overseas, Wash. Times, Feb. 25, 2002, LEXIS, News Library. DIMIA entered into a general agreement (defining the relationship), licensing agreement (authorizing use of detention centers), and detention services (detailing services and standards) contract with Australasian Correctional Services]
\end{footnotes}
2001, 7933 detainees were admitted into Australian immigration detention centers.\(^1\)

While detainees wait indefinitely for their claims to be processed, they suffer harmful effects.\(^15\) There is no provision for the exact length of claim processing.\(^16\) While the average length of time for detention is five months,\(^17\) confinement can last up to five years.\(^18\) In general, people fleeing to Australia, or any other place of refuge, already suffer from the lasting effects of oppression, threats of death, and other conditions.\(^19\) Reports have found these effects to be especially severe for children, many of whom have witnessed harm to family members or have themselves suffered from abuse and violence from persecutors.\(^20\) The effect of detention on children has been the recent focus of concern by governmental watchgroups.\(^21\)

---

\(^1\) Fact Sheet 82, supra note 12.


\(^15\) Unlawful non-citizens must be detained until they are removed, deported, or granted a visa. See Migration Act, §196.

\(^16\) Human Rights and Equal Opportunity Commission, A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner, §3.1.1, http://www.hreoc.gov.au/human_rights/idc/index.html (last modified October 2002). As of February 2002, the average time for Afghan asylum-seekers to be detained was five months. Crock, et al., supra note 8, at 80. The prolonged detention of Afghan asylum-seekers was a result of officials’ refusals to process Afghan claims after the fall of the Taliban government in Afghanistan, and resulted in protests and hunger strikes at the Woomera detention center. \textit{Id.} at 78-79. Even this is an improvement from May 1997, in which eighty-four detainees were held for over two years, sixteen for over three years, and fifteen for close to five years in the Port Hedland IDC. \textit{Human Rights and Equal Opportunity Commissioner, Those Who’ve Come Across the Seas—Detention of Unauthorised Arrivals} 80 (1998).

\(^17\) \textit{Id.}

\(^18\) \textit{Crock & Saul, supra note 8, at 12.}


III. DETENTION’S EFFECTS ON CHILDREN

While both adults and children are detained in Australia’s immigration centers, this Comment emphasizes the impact of detention on children. Harms to children as a result of their systematic incarceration in Australian immigration detention centers include the threat of sexual abuse, lasting mental, physical and psychological effects, substandard medical treatment, and limited educational opportunities.

First, children may be targets of sexual abuse in detention centers.\(^{22}\) In June 2000, refugee advocates demanded that detained children be released immediately following the indictment of two men for assaulting children at the Curtin detention center.\(^{23}\) The charges included several counts of sexual encounters with an eight-year-old boy and an eleven-year-old girl.\(^{24}\) Since then, more allegations of sexual abuse have emerged from the Woomera,\(^{25}\) Port Hedland,\(^{26}\) and Curtin detention centers.\(^{27}\) The mixing of children with unrelated adults makes these assaults possible.\(^{28}\)

Second, detention centers may also have a significant impact on a child’s mental health and prospects for healthy development.\(^{29}\) Health care workers have publicly expressed concern for the emotional development of detained children.\(^{30}\) Those concerns became manifest in a 2001 Human Rights and Equal Opportunity Commission (“HREOC”) report which found that despite the fact that several children suffered from distress and depression, there were no child psychologists in the centers.\(^{31}\) Another

---


\(^{24}\) O’Brien & Saunders, supra note 23.

\(^{25}\) Skelton, supra note 22.


\(^{27}\) Layla Tucak, Family of Allegedly Molested Boy Plead for Move to Sydney, AUSTRALIAN, Jan. 23, 2002, LEXIS, News Library. Family members of one five-year-old boy pled to have the family moved when allegations surfaced that the boy had been sexually assaulted by three men at the Curtin detention center.


\(^{29}\) National Inquiry, supra note 20.

\(^{30}\) Jill Sewell, Child Health Failing, AUSTRALIAN, Nov. 30, 2001, LEXIS, News Library.

\(^{31}\) National Inquiry, supra note 20.
report by the South Australian State Social Justice Minister found that child detainees' feeding and sleeping patterns were irregular.\textsuperscript{32} Some children have developed fears about sleeping due to guards' routine use of flashlight beams during random night patrols.\textsuperscript{33} At least one six-year-old became severely depressed and stopped eating after prolonged detention.\textsuperscript{34} Additionally, parents were not allowed to feed young toddlers outside set meal times, very young toddlers lacked proper bedding, and families slept on the floor in cramped conditions.\textsuperscript{35}

Third, one recent report suggests adults and children in detention receive unsatisfactory medical treatment.\textsuperscript{36} Detainees complain that medical problems are not taken seriously, and detainees must endure long waits before seeing doctors.\textsuperscript{37} For example, Mohammed Saleh was isolated in the "Juliet Block"\textsuperscript{38} of the Port Hedland Detention Center for nearly two weeks before he was allowed to seek medical attention for a condition that was ultimately diagnosed as a brain tumor.\textsuperscript{39} Saleh died from complications following surgery for the tumor.\textsuperscript{40} After his death, questions were raised about why Saleh was locked up in "Juliet Block."\textsuperscript{41} Those questions will likely go unanswered, however, because DIMIA and ACM officials claim they cannot locate Saleh's file.\textsuperscript{42}

Finally, detention centers provide limited education, if any.\textsuperscript{43} After one woman was told her son could not have access to education without a valid visa, she was forced to seek the aid of lawyers and the HREOC to obtain education for her son.\textsuperscript{44} A former child detainee reported that

\textsuperscript{32} \textit{Australian Detention Centre Slammed for Hurting Children}, AGENCE FR. PRESSE VIA NEWSEDGE CORP., Apr. 16, 2002, UNHCR, News Library (last visited Jan. 12, 2003).
\textsuperscript{33} Terry Plane, \textit{Detaining Children 'A Modern Torture,'} AUSTRALIAN, Nov. 29, 2001, LEXIS, News Library.
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.} This account of conditions at Woomera was reported by a social services team following the Easter riots, discussed \textit{infra} Part IV(B).
\textsuperscript{37} A Report on Visits to Immigration Detention Facilities, \textit{supra} note 17.
\textsuperscript{38} Elisabeth Wynhausen, \textit{A Deadly Shock To Our System,} AUSTRALIAN, Oct. 12, 2002, LEXIS, News Library.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.} "Juliet Block" is an area that "would break every building code in the country." Saleh was held in Juliet Block despite no history of behavioral problems. \textit{Id.}
\textsuperscript{42} \textit{Id.} Officials claim Saleh's file was lost in a center riot. \textit{Id.} The coroner is skeptical of this claim. \textit{Id.}
\textsuperscript{43} Moreover, such a claim suggests a possible breach of contract between DIMIA and ACM. \textit{Id.}
\textsuperscript{44} A Report on Visits to Immigration Detention Facilities, \textit{supra} note 17.
\textsuperscript{45} PETER MARES, \textit{BORDERLINE: AUSTRALIA'S TREATMENT OF REFUGEES AND ASYLUM SEEKERS 57} (2001).
children who cause trouble are not allowed to attend school. And although five children at the Maribyrnong Detention Center have recently been allowed by the federal government to enter the community to attend public school, educational services at the Woomera Detention Center remain "wholly inadequate."

In sum, the systematic incarceration of illegal migrant children in Australian immigration detention centers, with the resulting threats of sexual abuse, and the mental, emotional and developmental problems that result from the detention, create conditions that have been labeled "a modern form of torture."

IV. CRITICISMS, SOCIAL RESPONSES, AND GOVERNMENTAL REACTION TO AUSTRALIA'S DETENTION POLICY

A. Criticism of Australia's Detention Policy

Many groups and individuals, including Australian government officials, international bodies, human rights advocates, and health groups have spoken out against Australia's detainment of children. Chris Sidoti, HREOC Commissioner from 1995 to 2000, has described the detention

---

45 We Learned How to Cut Ourselves, AUSTRALIAN, July 19, 2002, LEXIS, News Library.
46 News in Brief, SUNDAY HERALD SUN (Melbourne), Sept. 29, 2002, LEXIS, News Library.
48 Plane, supra note 33.
49 Other groups have also opposed the detention policy. Health groups, including the Paediatrics and Child Health Division, Royal Australasian College of Physicians, and the Faculty of Child and Adolescent Psychiatry of the Royal Australian and New Zealand College of Psychiatrists, advocate that children and their families be released into the community. It is their position that "[c]orrectional agencies and the institutions of government are not suitable deliverers of such facilities." Sewell, supra note 30. The Red Cross has also spoken out. The Red Cross took out advertisements in Australian media expressing concern for all people currently held at immigration detention facilities across Australia—especially children—for their physical, emotional and psychological well-being. Grant Holloway, World Ponders Australia's Refugee Stance, CNN, Mar. 7, 2002, CNN.com, http://asia.cnn.com/2002/WORLD/asiapcf/auspac/01/28/aust.woomera.analysis/ (last visited Jan. 17, 2003). Religious leaders, including the Catholic Migrant and Refugee Office, also oppose the mandatory detention policy. Angela Shanahan, Butt Out of It, Bishops, AUSTRALIAN, Feb. 12, 2002, LEXIS, News Library. The Jesuit Social Justice Centre has described Australia's detention policy and the Pacific Solution as "morally reprehensible." Frank Brennan, Australia's Refugee Policy—Facts, Needs, Limits, UNIYA JESUIT SOCIAL JUSTICE CENTRE (2002) (Jesuit Lenten Seminars). Particular focus has been on the constant exposure of children at Woomera to distressing and traumatizing events. The Jesuit Social Justice Centre has called for the release of children. Penelope Debelle & Russell Skelton, Children Draw on their Own Trauma, AGE, Apr. 9, 2002, LEXIS, News Library. Finally, the U.S., French, British, and Chinese foreign press have spoken out against Australia's policy. Paul Ham, Damned for Desert Hell-holes, AUSTRALIAN, Feb. 14, 2002, LEXIS, News Library.
policy as expensive and unsustainable. The former director of Australian Protective Service ("APS"), the governmental agency formerly responsible for managing the detention centers, has also criticized Australia's current detention policy.

The international governing body, the United Nations High Commissioner for Refugees ("UNHCR"), and several international human rights organizations have been particularly outspoken against Australia's detention policy. According to United Nations Association of Australia President Margaret Reynolds, Australia is out of step with international law.

The UNHCR opposes the detention of children, and the former United Nations High Commissioner for Human Rights has publicly expressed her dissatisfaction with the Government's account of its treatment of refugees.

Human rights advocates that have spoken out against mandatory detention include Amnesty International, Human Rights Watch ("HRW"), and HREOC. Amnesty International Secretary General Irene Khan has emphasized Australia's obligation to respect international law and called for an end to mandatory detention:

There is nothing fair about locking up hundreds of children, women and men, without charge or review by a court, simply because they lack a visa—nothing fair, especially when the vast majority of the people who are detained are later found to be refugees, according to the Australian authorities.

---


51 Peter Dawson, *Nobody Wins Treating Refugees Like Dogs*, *AGE*, Apr. 25, 2002, LEXIS, News Library. Unlike current policy, APS officers under the former regime were encouraged to get to know detainees, centers were free from razor wire, and APS did not even have riot gear. Id.


53 UN Refugee Agency Criticises Australia Over Asylum Seekers, *AGENCE FRANCE PRESSE VIA NEWSEDGE CORP.*, Feb. 2, 2002, UNHCR, News Library [hereinafter *UN Criticism*]. UNHCR also expressed concern over the Australian Government's call for the speedy return of Afghan asylum-seekers, and warned of precarious security and problems for certain ethnic groups in parts of Afghanistan. Id.


HRW has called for the Australian government to stop detaining unaccompanied children seeking asylum and for the release of information about the reportedly harsh conditions under which the children are kept. HRW has further accused the Australian Government of trying to enlist support for its policy from the international community. Finally, HREOC’s Sev Ozdowski described the Woomera detention center as “a culture of despair.”

B. Protests Against Australia’s Detention Policy

In March 2002, security began to tighten at the Woomera Immigration Reception and Processing Center (“IRPC”) as ACM officers, extra guards, federal police, dog squads, and horse patrols attempted to prepare for an Easter weekend rally expected to attract thousands of protestors. These security measures, however, did not prevent protesters from gathering at the center “for a four-day demonstration calling on the Federal Government to end its policy of mandatory detention of asylum-seekers.” Despite tightened security, the officers were not prepared for the violent clashes that resulted when forty-seven detainees escaped and more than one hundred detainees confronted ACM officers. During the course of the riot, women and children were tear-gassed and thirty people were injured. The riot occurred after the Australian government ceased processing Afghan asylum claims, a change brought about by the fall of the Taliban regime. According to news reports, the majority of protesters were Afghans and Iraqis who had recently been refused visas.

The Easter weekend riots were not the first detainee protests, however. Leading up to the riots, detainees attempted to hang themselves nearly every day. Furthermore, on January 18, 2002, DIMIA confirmed that fifty-eight detainees at the Woomera detention center in South Australia

58 Marks, supra note 54.
61 Id. In the end, thirty-seven escapees were recaptured. Id.
62 Id.
63 CROCK & SAUL, supra note 8, at 78-9.
64 Farouque & Skelton, supra note 60.
65 Williams, supra note 59.
66 Id. Included were reports that ACM guards were slow to help suicidal detainees. Id.
had sewn their lips together protesting the excessive time taken to process refugee claims.67 Two days later the numbers soared to between seventy and a hundred, while two hundred others initiated hunger strikes.68 Finally, in the seventh day of the hunger strike, eighteen protestors were hospitalized for dehydration.69

Among those hospitalized for dehydration was a fourteen-year old boy who had re-sewn his lips after having stitches removed.70 In all, children comprised thirty-six of the two hundred protesters.71 Their participation prompted the HREOC to inquire into possible breaches of Australia's commitments under the International Convention on the Rights of the Child (“CRC”).72

C. Response to Criticism and Protests

DIMIA’s response to protests has been generally callous.73 Despite the overwhelming outcry against the detention policy and recommended alternatives, there has been minimal, if any, improvement for children in detention.74 The Minister of Immigration, Phillip Ruddock, has countered his critics by stating that the policy “enables [the government] to assert the

---

70 Id.
71 Id.
73 Dennis Shanahan & Megan Saunders, Attitudes to Boatpeople Hardening—Election 2001, AUSTRALIAN, Oct. 31, 2001, LEXIS, News Library. Ruddock accused Tampa boatpeople of trying to damage the vessel they were ultimately rescued from. Id. Ruddock also accused the UNHCR of tricking Australia into processing Tampa boatpeople on Australian soil when it offered to help solve the crisis. UN Tried to Trick Us in Tampa Crisis: Ruddock, SYDNEY MORNING HERALD, Oct. 23, 2001, LEXIS, News Library. Ruddock accused former Liberal Prime Minister Malcolm Fraser of having a diminished memory, after Fraser attacked the Howard Government's handling of the asylum-seeker issue. Libs Clash Over Asylum Seekers, AGE, Oct. 21, 2001, LEXIS, News Library.
74 A Report on Visits to Immigration Detention Facilities, supra note 17. For example, education for children in detention does not compare with that in the community. Id. Class times are shorter and attendance is not mandatory. Id. Even the Immigration Department’s recent pilot program to enroll nine children from Baxter into local (Port Augusta) primary and high schools was delayed when parents threatened to remove their children if the children from Baxter were enrolled without consultation. Rebecca DiGirolamo, Rift Over Teaching Detainee Children, AUSTRALIAN, November 19, 2002, LEXIS, News Library.
primacy of our right to determine who settles in Australia." Ruddock has responded to governmental and international reports denouncing detention conditions by labeling criticisms as flawed; accusing human rights advocates of being naïve; arguing that mandatory detention is effective as a deterrent; praising the policy as an economic boon for communities that house centers; minimizing the impact of detention centers by labeling them "processing centres"; and, in the face of international pressure, stressing that the present system will not change. For example, when facing UN critics in Geneva, Minister Ruddock answered that Australia’s mandatory detention policy “saves lives” and “saves space,” and cautioned other countries from being distracted by “sterile arguments about the nuances of refugee law.”

When specifically confronted about the detention of children, Prime Minister Howard has taken the position that it is the fault of the parents for bringing the children on “perilous voyages” to Australia. This is not, however, the case with unaccompanied children—many of whom have been sent over by extended families because their parents have been killed. Marion Le, of the Independent Council for Refugee Advocacy, argues that Ruddock, as loco parentis, is responsible for the well-being of unaccompanied children. Ruddock, however, has allegedly delegated his duty elsewhere in the Department of Immigration; a Department that has been accused of reclassifying unaccompanied minors as adults to avoid a duty of care. In sum, the government has made it clear that the mandatory detention policy is here to stay.

V. THE FAILURE OF DOMESTIC AND INTERNATIONAL LEGAL METHODS TO ADDRESS DETENTION CONDITIONS

Detainees and their families have attempted to redress detention harms using traditional domestic and international methods. Practically, however, these methods are ineffective because of preclusive domestic

76 Taylor, supra note 21.
81 Vanda Carson, Ruddock "Not Fit" to be Guardian, AUSTRALIAN, June 11, 2002, LEXIS, News Library. Ruddock steadfastly supports mandatory detention even though his own daughter has publicly spoken out against mandatory detention, and announced that she was leaving the country due to the mandatory detention policy. When Compassion Has to Go: Ruddock, DAILY TELEGRAPH, Sept. 17, 2002, LEXIS, News Library.
legislation, problems enforcing international treaties, and complexities that stem from the government’s delegation of detention center management to the corporate subsidiary, ACM.

A. The Hampering Effect of the Migration Act

Administrative and judicial review of migration decisions is ineffective in combating the mandatory detention policy because of strict limitations imposed by various amendments to the Migration Act of 1958. Although, beginning in 1975, the government responded firmly to large numbers of boat people illegally entering Australia, it was not until 1989, when the Cold War ended and the level of illegal migrants had grown again, that the Australian government took a “firmer stand” in curbing illegal migration.

The Migration Legislation Amendment Act of 1989 first attempted to deter migrants by “strengthening border controls, introducing mandatory detention and the removal of illegal entrants, and limiting opportunities for judicial review.” Later legislative amendments limited the power of courts by prohibiting the release of illegal immigrants before their claims were finalized. Legislation also increased the number of rejected refugee claims through the creation of an independent administrative tribunal. Another legislative constraint is the “safe third country” policy in which asylum-seekers become ineligible for refugee status if they have first passed through countries where they could have filed for asylum. The practice of withholding legal advice and assistance until specifically requested by detainees was also codified in 1994. In 1999, when “Australia witnessed the highest number of unauthorized boat arrivals since the landing of Indo-

---

82 Andreas Schloenhardt, Australia and the Boat-People: 25 Years of Unauthorised Arrivals, 23(3) U. NEW S. WALES L.J. 33, 33-36 (2000). This followed the fall of Vietnam and resulting exodus from the country. Id.
83 Id. at 39-43.
84 Id. at 43 (discussing the Migration Legislation Amendment Act, 1989 (Austl.)).
85 Id. at 46 (discussing the Migration Amendment Act (No. 24), 1992 (Austl.)).
86 Id. at 47 (discussing the Migration Reform Act, 1992 (Austl.), pt. 4A, which is now codified in §§ 411-473 of the Migration Act).
87 Andreas Schloenhardt, Australia and the Boat-People: 25 Years of Unauthorised Arrivals, 23(3) U. NEW S. WALES L.J. 33, 48 (2000) (discussing the Migration Legislation Amendment Act (No. 4) 1994 (Austl.)). The “safe third country” was particularly concerning since it would “delegate the responsibility of protecting and determining refugees to countries which may have no or only questionable asylum procedures.” Id. at 49.
88 Id. at 51 (discussing the Migration Legislation Amendment Act, 1994 (Austl.)). "Current practice does not take into account that most immigrants to Australia face severe difficulties with the English language and are usually, if not always, unfamiliar with national legal and administrative systems let alone international law." Id. at 51.
Chinese refugees in the late 1970s," the government further stepped up its policy of deterrence by reducing the ability of detainees to complain,\(^9\) providing refugee status information only upon request,\(^9,0\) and creating temporary protection visas that provided less protection and benefits for on-shore applicants.\(^9,1\)

The most recent spate of legislation that followed the *Tampa* incident, enacted on September 26, 2001 and called the "Pacific Solution,"\(^9,2\) stringently reduced the grounds and methods in which asylum-seekers can challenge visa rejections,\(^9,3\) and authorized warrantless searches, including strip searches, of detainees.\(^9,4\) Specifically, the Migration Legislation Amendment (Judicial Review) Act of 2001 purported to take away detainees' power to appeal final migration decisions.\(^9,5\) The "Pacific Solution" amendments have been criticized for degrading refugee protection,\(^9,6\) as well as being unsustainable and economically infeasible.\(^9,7\)

---

\(^9\) Id. at 52 (referring to Migration Legislation Act (No. 1), 1999 (Austl.)).

\(^9,0\) Id.


\(^9,2\) This was in response to "increasing numbers of mainly Middle Eastern refugee claimants." Id.

\(^9,3\) Peyser, *supra* note 9, at 431-32. Peyser recounts the facts as:

On August 26, 2001, when a crippled Indonesian ferry was sighted foundering in the Indian Ocean, Australian immigration officials announced that the biggest boatload of asylum-seekers ever to attempt to reach Australian shores was on its way. Fortunately, over 430 Afghan and Iraqi migrants were rescued by the M/V *Tampa*, a Norwegian freighter, and taken to waters off Christmas Island. When the *Tampa* entered Australian waters seeking assistance, Prime Minister John Howard ordered the Australian Defense Force to seize control of the Norwegian vessel and hold the migrants on board in order to keep them from setting foot on Australian soil and trying to claim asylum. Five days later, Howard ordered the migrants transferred onto the HMAS *Manoora*, bound for the island-state of Nauru, for distant asylum processing. This was the beginning of what Australia calls its 'Pacific Solution.'

\(^9,4\) Id. For example, no class actions lawsuits are permitted. Migration Legislation Amendment Act, No. 1, 2001 (Austl.). Migration Legislation Amendment (Judicial Review) Act, 2001 (Austl.). For more information on the "Pacific Solution" and other recent legislation, see Peyser, *supra* note 9.

\(^9,5\) Migration Legislation Amendment (Immigration Detainees) Act (No. 2) 2001 (Austl.). This was apparently an agreed upon solution between the Labor Party and the Immigration Minister, Phillip Ruddock. *Strip Searches At Detention Centers Get Nod From Labor*, *SYDNEY MORNING HERALD*, Aug. 10, 2001, LEXIS, News Library.

\(^9,6\) Migration Legislation Amendment (Judicial Review) Act 2001 repealed and replaced §474 of the Migration Act of 1958. Section 474 currently disallows challenges to privative clause decisions; e.g. migration decisions. *Id.*


\(^9,8\) Id.

\(^9,9\) Id.
B. Lawsuits

Several detainees, and families of detainees, have filed suit against the private management firm, ACM, and the Government for harms sustained while in detention.\textsuperscript{98} One family is suing the Commonwealth and ACM for negligence in failing to provide a safe sleeping environment for their two-year-old daughter, who fell from a bunk-bed lacking guard rails and suffered multiple fractures.\textsuperscript{99} Another lawsuit was recently brought by Shahid Qureshi who, after spending six months in immigration detention, during which he had beams of light shone into his eyes nightly and had to share a toilet with seventy others, was not only denied asylum, but was given a bill for AUD 14,250, the equivalent of AUD 79 per night.\textsuperscript{100} Qureshi, who cannot work because of his illegal status, has sued the Australian government, contending that the bill is an illegal tax and an unjust confiscation of property.\textsuperscript{101} Most recently, ACM and the Commonwealth came under fire when three ACM guards, charged with severely beating a thirteen-year-old unaccompanied minor, failed to appear in court.\textsuperscript{102}

C. Privatization and Accountability Difficulties

Unfortunately, privatization of detention management centers may present insurmountable obstacles to these detainee lawsuits. Australian immigration detention centers are not managed by the government, but instead by a private management firm, ACM, under contract with DIMIA.\textsuperscript{103} Although agencies exist which monitor ACM, those agencies are ineffective either because their powers have been curtailed by Migration Act provisions,

\textsuperscript{98} The right to bring tortious claims against the Commonwealth is codified in Judiciary Act 1903, § 56 (Austl.). For an analysis of claims against the Commonwealth and the Commonwealth’s immunity from suit, see \textsc{The Australian Law Reform Commission, Discussion Paper No. 64, Review of the Judiciary Act 1903: Claims Against the Commonwealth} 286, 332 (Dec. 2000).

\textsuperscript{99} Rebecca DiGirolamo, \textit{Family Sues Over Child’s Injury}, \textsc{Australian}, July 1, 2002, LEXIS, News Library.


\textsuperscript{101} \textit{Id.} Charging detainees a daily fee for their detention is just another aspect of Australia’s policy, and one that is justified by the Government as mandated by a statute regarding recovery for taxpayers. Furthermore, because illegal immigrants may not apply for asylum if they owe debts to the Australian government, asylum-seekers like Qureshi, with no means to reimburse the government, will be precluded from reapplying for asylum in the future. \textit{Id}.

\textsuperscript{102} Russell Skelton, \textit{The Case of a Bashed Boy and Three Missing Guards}, \textsc{Australian}, Oct. 5, 2002, LEXIS, News Library. ACM has refused to say whether the three men are currently employed by the company. \textit{Id}.

\textsuperscript{103} See Lemke, \textit{supra} note 13.
or because the agency itself is controlled by DIMIA. Furthermore, obtaining needed information about detention conditions can be difficult because the government contract with ACM is protected by the doctrine of "commercial confidentiality." ACM is the private Australian subsidiary of a U.S. company, Wackenhut Corrections. ACM has been under contract since 1997 with DIMIA to manage Australia's detention centers. Although its management of the immigration detention centers has created the greatest controversy, and generated its greatest profits, ACM's business interests in Australia also include running three private jails, providing health services to eleven prisons in Victoria, transporting prisoners, and managing a police custodial center in Melbourne.

In addition to general reports of protests, sexual abuse, and suicide attempts in detention centers, ACM has been widely criticized for its everyday treatment of detainees. Allegations have surfaced that ACM staff members humiliate detainees and use numbers instead of names. Further reports reveal a lack of staff training, short-term contracts for Woomera staff, and the absence of monitoring arrangements between the government and ACM. A recent audit found that "[s]uicidal detainees at the Woomera detention center were left unmonitored for up to four hours at a time when they were supposed to be checked every 15 minutes." Finally, "Western Australia's Inspector of Custodial Services, Richard Harding, says conditions in the detention centers are worse than in prisons."

Three agencies are responsible for overseeing the detention centers and for monitoring ACM's management. They are the HREOC, the Ombudsman, and the Immigration Detention and Advisory Group.
("IDAG"). The HREOC was established by the Human Rights and Equal Opportunity Commission Act of 1986. By statute, HREOC has the power to inquire when asked by the Minister, or upon its own initiative, into human rights standards, provide guidelines for compliance, and when under court authority, to intervene in proceedings involving human rights issues. Recent amendments to the Migration Act have curtailed its power, however, because under the Act, HREOC cannot contact detainees unless detainees have first made a written complaint to HREOC.

The Ombudsman Act of 1976 established an Ombudsman to investigate matters of "administration," whether initiated by complaint or by his or her own motion. The Ombudsman is not allowed, however, to investigate action taken by the Minister. Similar to HREOC, the Ombudsman's power to contact detainees has further been curtailed by amendments to the Migration Act.

Finally, the Immigration Minister himself created IDAG to "provide advice on the appropriateness and adequacy of services," including accommodations and facilities in detention centers. IDAG is the only external group "with unfettered access to the detention centers," and was created in response to the 2001 "Flood Report." The report exposed allegations against ACM of child abuse, verbal abuse, failure to report incidents of harm, and further proposed financial sanctions against ACM. Nonetheless, the group's members are appointed by Ruddock and IDAG has been criticized for its lack of independence.

Even when legislation, or the Minister himself, does not curtail detainee claims, they may still be hampered by the "commercial in

115 Id.
117 Id. § 11.
120 Id., § 5(2).
121 See Migration Act, § 193(3)(a) and Ombudsman Act, 1976, § 7(3)(b).
123 Id.
125 Benjamin Haslem, We Run Our Own Race: Ruddock Advisers, AUSTRALIAN, Jan. 31, 2002, LEXIS, News Library.
confidence” mechanism. While the public is typically allowed to have access to agency records under the Freedom of Information Act,\textsuperscript{126} companies like ACM are protected from public access to its corporate documents by the “commercial in confidence” clause.\textsuperscript{127} The public is therefore denied information disclosure on how the centers are run.\textsuperscript{128} ACM, like other large firms under contract with the government, is accorded a privileged position; its veil of commercial confidentiality has been called a “cult of secrecy.”\textsuperscript{129}

D. International Law Recognizes Human Rights

Detainees may still seek relief for detention harms under international treaties that forbid violations of generally recognized human rights. Just as in the domestic context, however, there are problems with enforcing such claims.

Several sources of international law recognize human rights. The Convention relating to the Status of Refugees prohibits states from imposing penalties on unauthorized refugees, and from unnecessary restriction of refugee movement.\textsuperscript{130} The International Covenant on Civil and Political Rights (“ICCPR”) makes rights proclaimed in the Universal Declaration of Human Rights legally binding.\textsuperscript{131} These rights include the prohibition of

\begin{flushright}
\textsuperscript{126} Freedom of Information Act, 1992 (Austl.).
\textsuperscript{127} Id. § 33. Agencies are not to give access to a document which contains trade secrets or other commercial or business information unless the agency has taken reasonably practicable steps to obtain the views of the third party as to whether the document contains matter that is exempt under clause 4 of Schedule 1. Id. Clause 4 makes exceptions to the commercial exemption where the third party consents, or where the matter is found to be in the public interest. Id.
\textsuperscript{128} Shame of Detention, supra note 111. Recently, HREOC announced that ACM and DIMIA would not be allowed private hearings during the testimony phase of HREOC’s national inquiry into the detention of children. DIMIA, ACM to Give Evidence in Public: Commissioner, AAP NEWSFEED, Oct. 9, 2002, LEXIS, News Library. The public was able to have documents released relating to the suicide of an inmate at Brisbane’s Arthur Gorrie prison, but it reportedly took seven years to obtain such information. Justine Nolan, Jail Suicide Part of Tragic Litany, COURIER MAIL, May 18, 2001, LEXIS, News Library.
\textsuperscript{129} See A Town Bound by the Cult of Secrecy, AGE, Feb. 2, 2002, LEXIS, News Library (describing Woomera, a remote town run by the Australian Defense Department, that houses a detention center of the same name, and where residents “[h]ear no evil, see no evil, and speak no evil”); The Solicitor: Fol Key to Credibility, AGE, Sept. 16, 1999, LEXIS, News Library (discussing Australian government’s trend of citing “commercial confidentiality” as reason to keep contracts within privatized industries secret); Elisabeth Wynhausen, Welcome to the Hell Hotel, AUSTRALIAN, Mar. 30, 2001, LEXIS, News Library (noting that, because of “commercial confidentiality,” DIMIA and ACM are the only parties that know whether penalties exist for ACM regarding the number of suicides and attempted suicides that occur in detention centers).
\textsuperscript{130} Refugee Convention, supra note 10.
\textsuperscript{131} International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 9(1), 999 U.N.T.S. 172 [hereinafter ICCPR]. See also Australian Human Rights Center, Communicating With The Human Rights Committee: A Guide to the Optional Protocol to the International Covenant on Civil
arbitrary detention\textsuperscript{132} and the right to legally challenge detention.\textsuperscript{133} In addition, the CRC\textsuperscript{134} specifically recognizes the rights of children,\textsuperscript{135} containing an outright prohibition against their detention unless as a last resort and only for the shortest time necessary.\textsuperscript{136} The CRC further directs that children who are detained should be separated from adult detainees unless found to be contrary to a child's best interest,\textsuperscript{137} and that decisions about children must further the development of the child.\textsuperscript{138} Finally, the CRC recognizes a child's right to seek asylum protection.\textsuperscript{139}

Additionally, the CRC and the International Covenant on Economic, Social and Cultural Rights,\textsuperscript{140} recognize a child's right to education,\textsuperscript{141} a child's right to the highest physical and mental health standards and facilities,\textsuperscript{142} a child's right to play,\textsuperscript{143} and a child's right to the care of his or her parents.\textsuperscript{144} These treaties are supported by the UNHCR, which views the detention of asylum-seekers as inherently undesirable.\textsuperscript{145} This is especially the case when children, unaccompanied minors, and those with special medical or psychological needs are being detained.\textsuperscript{146}

\begin{footnotes}
\footnotetext[132]{ICCPR, supra note 131, at 175.}
\footnotetext[133]{Id. at 176.}
\footnotetext[134]{CRC, supra note 72.}
\footnotetext[135]{Id. at 55. Article 37(b) of the CRC provides that children must not be arbitrarily deprived of their freedom, and detention "shall be used only as a measure of last resort and for the shortest appropriate period of time." Id. "Although it is not clear what the 'shortest appropriate period of time' is, nine children have been detained at the Woomera detention facility for more than a year." Alexander J. Wood, The "Pacific Solution": Refugees Unwelcome in Australia, 9 HUM. RTS. BR. 22, 24 (2002).}
\footnotetext[136]{Id. at 47, art. 6(2).}
\footnotetext[137]{Id. at 51, art. 22.}
\footnotetext[139]{CRC, supra note 72, at 28; ISESCR, supra note 140, arts. 13, 15.}
\footnotetext[140]{CRC, supra note 72, at 24; ISESCR, supra note 140, art. 12.}
\footnotetext[141]{CRC, supra note 72, at 31.}
\footnotetext[142]{Id. art. 18; ISESCR, supra note 140, art. 23.}
\footnotetext[144]{Id.}
\end{footnotes}
E. Recognition Does Not Lead to Enforceability

Although international treaties recognize human rights, these rights are not necessarily enforceable. Obstacles relate to ratification of treaties and problems with enforcement. First, international treaties must be ratified and incorporated into domestic law. In Australia, treaty making is the responsibility of the Executive Branch. The Parliament is responsible for examining the proposed treaties and creating legislation to give them effect. One example of this is the ICCPR, which requires parties to adopt measures that give effect to the rights espoused by ICCPR. The ICCPR has not been adopted as part of Australian law, but has instead been attached as a schedule to the Human Rights and Equal Opportunity Commission Act of 1986. Thus, even though the ICCPR established the Human Rights Committee ("Committee") to monitor states' adherence to the treaty, Australia treats this authority as advisory, but not binding.

Second, even when treaties have been ratified, individuals are limited by the manner in which they may bring claims. In Australia, those who may be victims of human rights violations are prevented from initiating any legal proceedings, not directly related to their migration status, if they are characterized as offshore entrants. Four treaties, however—the ICCPR, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women—allow individuals to bring their complaints before international bodies regarding breaches of international rights. Article 9 of the ICCPR's Optional Protocol specifically allows the Committee to consider

---


149 ICCPR, supra note 131, art. 2.

150 Australian Human Rights Center, supra note 131.

151 Department of Foreign Affairs and Trade, supra note 148.


153 FITZPATRICK, supra note 147, at 23-34.
individual detainee complaints regarding violations of ICCPR rights.\textsuperscript{154} In \textit{A v. Australia},\textsuperscript{155} which involved a complaint by an asylum-seeker who was detained for five years, the Committee concluded that Australia’s detention of A was arbitrary and that Australia had violated the ICCPR by precluding court review of A’s detention.\textsuperscript{156} Yet despite the Committee’s direction that Australia report on progressive measures within ninety days (as of July 2000), Australia failed to do so.\textsuperscript{157}

Given the limitations of domestic and international redress in Australia, new approaches are needed. In the following section, this Comment discusses an alternative forum for redress: the United States courts.

VI. THE ALIEN TORT CLAIMS ACT APPROACH

Bringing suit against ACM or its parent companies, Wackenhut Corrections and Wackenhut Corporation, in a U.S. forum\textsuperscript{158} under the Alien Tort Claims Act ("ATCA")\textsuperscript{159} may provide a way to circumvent international roadblocks to the redress of detention center harms. The ATCA gives U.S. courts a powerful tool with which to directly enforce international human rights norms in the domestic arena.\textsuperscript{160}

The ATCA states: "The district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\textsuperscript{161} Since 1980, human rights advocates have been steadily expanding the ATCA’s scope to include multinational corporations, although the Supreme Court has not ruled on the issue.\textsuperscript{162} This Comment argues that in spite of the Ninth Circuit’s recent expansion of the ATCA’s reach, the ATCA remains ineffective to redress...
human rights violations in the privatized immigration context because of difficulties in proving Wackenhut's responsibility for the actions of its subsidiary, ACM.

A. The ATCA's Evolution

The ATCA has been interpreted and relied upon since 1980 in charging "foreign government officials, private individuals, foreign governments, and multinational corporations" with violations of international law—particularly human rights violations.\(^{163}\) In 1980, nearly 200 years after it was first enacted, the ATCA was first used to bring suit against a government official for acts of torture.\(^{164}\) In *Filartiga v. Pena-Irala*, the Second Circuit held "that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."\(^{165}\)

In support of its holding, the *Filartiga* court addressed two key issues surrounding the ATCA: (1) whether the alleged conduct violated the "law of nations,"\(^{166}\) and (2) whether there was Article III jurisdiction over a tort.\(^{167}\) The *Filartiga* Court answered both in the affirmative.\(^{168}\) It looked to nineteenth-century case law and determined that torture rose to a violation of the law of nations.\(^{169}\) As to jurisdiction, the Court found that "[c]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred."\(^{170}\) The Court further stated that the law of nations had always been part of U.S. federal common law.\(^{171}\)

The ATCA has subsequently been interpreted and expanded to provide not only jurisdiction, but also a cause of action.\(^{172}\) To assert a cause of action, plaintiffs must allege a violation that is "specific, universal, and obligatory."\(^{173}\) In 1995, when faced with claims of torture and mass execution alleged to have taken place in Bosnia-Herzegovina, the Second


\(^{164}\) See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

\(^{165}\) Id. at 878.

\(^{166}\) Id. at 880-85.

\(^{167}\) Id. at 878, 885-89.

\(^{168}\) Id.

\(^{169}\) *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 880-82 (2d Cir. 1980).

\(^{170}\) Id. at 885.

\(^{171}\) Id.

\(^{172}\) See In re Estate of Ferdinand E. Marcos, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994).

\(^{173}\) Id. at 1475.
Circuit in *Kadic v. Karadzic* expanded its interpretation of the ATCA by extending its provisions to non-state actors.\(^{174}\) There, the Court found for the first time that private individuals could be held liable for genocide and war crimes, regardless of state action.\(^{175}\)

These holdings have since been implemented to reach multinational corporations.\(^{176}\) In *Doe v. Unocal*, a suit brought by Burmese villagers against multinational oil companies based in the United States, the Central District Court of California dismissed the villagers’ claims after failing to find a disputed question of fact as to whether Unocal directly participated in harmful activities.\(^{177}\) Nevertheless, the Court held that non-state actors could be found liable for human rights violations, both when acting individually and when acting under color of law.\(^{178}\)

In September 2002, the Ninth Circuit reversed the District Court’s grant of summary judgment to Unocal on forced labor, murder and rape claims, finding sufficient evidence to raise genuine issues of material fact under the ATCA.\(^{179}\) The Ninth Circuit set forth a standard for finding non-state parties liable under the ATCA.\(^{180}\) Borrowing from international criminal law tribunals, it held that a non-state party could be found liable for aiding and abetting crimes when it provides knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.\(^{181}\)

The Court found that because forced labor is a modern variant of slavery, it does not require state action to give rise to liability under the ATCA.\(^{182}\) The Court then applied this standard to Unocal and found sufficient evidence of Unocal’s liability for forced labor.\(^{183}\) Finally, the Court found evidence of Unocal’s liability for allegations of murder and rape,\(^{184}\) claims that could be directly enforced against Unocal as a non-state actor because they were committed while in the pursuit of slavery.\(^{185}\) In sum, the Ninth Circuit’s decision expanded the ATCA’s reach to include not just direct actions of multinational corporations, but aiding and abetting

---

174 See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
175 *Id.* at 241-44.
177 *Id.*
178 *Id.*
180 *Id.* at 48-50
181 *Id.*
182 *Id.* at 32-35.
183 *Id.* at 36-55
185 *Id.* 56-57.
activities as well.

B. **Wackenhut is a Multinational Corporation**

Wackenhut Corporation, with 68,000 employees and 2001 revenues of USD 2.8 billion, is a multinational enterprise. Wackenhut Corrections Corporation, its subsidiary, is nearly unrivaled in the area of immigration detention centers and has contracted with national and local governments to manage detention facilities around the world. Wackenhut is the largest U.S.-based provider of security services. The company generally prefers to staff its centers with applicants who have military or special services backgrounds and has boasted to potential investors that it operates "the equivalent of the immigration and naturalisation system for confinement in the entire country of Australia." Wackenhut Corrections Corporation is the sole owner of ACM.

Like ACM, Wackenhut's operations have a checkered history. For example, Texas terminated Wackenhut's contract to run Coke County Jail in 1999 after twelve employees were indicted on rape and sexual harassment charges. Moreover, juveniles housed in a Wackenhut prison in Louisiana were removed last year when officials claimed the children were beaten and deprived of adequate food and clothing. These, and other allegations in the United States, have resulted in lawsuits against Wackenhut.

Private actors such as Wackenhut could potentially be held liable for human rights violations committed against the law of nations, either directly

---

188 Id.
191 Macken, *supra* note 189.
192 Id.
193 Id.
194 Id.
195 Id.
or as an aider and abettor. Violations found to meet this classification include genocide, torture, extrajudicial killing, unlawful detention, forced labor, and sexual assault. In the Australian detention context, Wackenhut might be liable for unlawful detention, as well as torture and cruel, inhuman, and degrading treatment. Lawyers have already announced a pending suit against Wackenhut and Wackenhut Corrections under the Alien Tort Claims Act for harms caused by ACM, its Australian subsidiary.

C. The ATCA’s Limitations

The ATCA is a poor solution for redressing human rights violations committed in Australia’s detention centers because of difficulties in proving Wackenhut’s responsibility for the actions of its subsidiary, ACM. Even without this difficulty, however, this Comment argues that the ATCA may not be the best answer to the problem of human rights violations in Australian detention centers.

Corporate law is governed by entity and enterprise principles. Under entity law, each corporation that is part of a multinational corporation is viewed as having its own rights and duties. In contrast, the enterprise theory views the same multinational corporation as one single entity, with one “popular national identity.” This view is consistent with economic and public views. Nonetheless, traditional entity principles generally control treatment of multinational corporations, often insulating multinational parent corporations from liability for subsidiaries’ activities.

Despite the law’s emphasis on entity principles, courts will exercise jurisdiction over a foreign corporation for the activities of subsidiaries where the U.S. subsidiary is an alter ego or an agent of the foreign parent. In the international human rights context, a U.S. subsidiary is the alter ego of its foreign parent when unity and ownership are commingled such that separate identities simply do not exist. A subsidiary is an agent of its foreign parent.

---

198 See Kadic, supra note 174.
199 Collingsworth, supra note 160, at 184.
200 Carson, supra note 158. “Lawyers will claim that asylum-seekers in Australia’s detention centers are subject to ‘cruel, inhuman or degrading treatment or punishment’ over prolonged periods. This would be in breach of Article Five of the Universal Declaration of Human Rights . . . .” Id.
202 Id.
203 Id.
204 Id.
205 Id. at 495.
206 GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 152 (1996).
207 Blumberg, supra note 201, at 498 (discussing Doe v. Unocal, 248 F.3d 915 (9th Cir. 2001)).
parent when, absent the subsidiary's existence, the foreign parent would itself have to perform those same activities.\(^{208}\) In a recent case that addressed these principles, *Doe v. Unocal*,\(^{209}\) the Court dismissed human rights claims against Total, a foreign parent corporation with U.S. subsidiaries.\(^{210}\) In that case, the Ninth Circuit engaged in a jurisdictional analysis, holding that the foreign parent, through its U.S. subsidiaries, had insufficient contacts with the United States because direct parental control of the subsidiaries' daily activities could not be proved.\(^{211}\) Evidence of indirect supervision by the parent corporation was equally unpersuasive.\(^{212}\)

While the *Doe* jurisdictional problems do not exist in this case, because Wackenhut, the parent corporation, is incorporated in the United States, difficulties remain with suing a U.S. parent for the actions of its foreign subsidiary. There are no minimum contacts obstacles in obtaining jurisdiction over Wackenhut because "[t]he American parent corporation is, of course, readily amenable to assertion of *in personam* jurisdiction in any state in which it is incorporated or is doing business."\(^{213}\) Nonetheless, problems exist in proving that Wackenhut is responsible for ACM's actions.\(^{214}\) "Where the subsidiary has been the actor or principal actor, this has proved well nigh impossible"\(^{215}\) and it is unlikely that such claims would sustain a motion to dismiss for failure to state a cause of action.\(^{216}\) Thus, it is unlikely that an ATCA claim against Wackenhut will survive where it is the subsidiary, ACM, who is responsible for detention center harms.

Finally, even if an ATCA claim survived a motion to dismiss, and the ATCA was successfully used to redress detention harms, a question remains whether this would be an ideal result. If multinational corporations like Wackenhut are found to be responsible for detention harms, they might face domestic and international scrutiny, but the result may not necessarily be in the interests of the detainees.\(^{217}\) In reality, it is just as likely that another multinational corporation—one that is not subject to jurisdiction in the United States—will pick up where Wackenhut left off.\(^{218}\)

\(^{208}\) *Id.*

\(^{209}\) 248 F.3d 915 (9th Cir. 2001).

\(^{210}\) *Id.*

\(^{211}\) *Id.* at 928-31.

\(^{212}\) *Id.*

\(^{213}\) Blumberg, *supra* note 201, at 500.

\(^{214}\) *Id.*

\(^{215}\) *Id.*

\(^{216}\) *Id.*

\(^{217}\) H. Knox Thames, Australian Human Rights Center, *The Effectiveness of U.S. Litigation Against MNCs in Burma*, 9(2) HRD 13.

\(^{218}\) *Id.*
In May 2001, Ruddock announced that the detention center contract with ACM would be put up for tender “to see whether or not we are obtaining the best value for the Commonwealth (and) for taxpayers.”

One contender for ACM’s detention center contract was Group 4, the subsidiary of Group 4 Falck, a Danish corporation. Wackenhut was purchased in whole by Group 4 Falck in September 2002, and in December 2002, DIMIA announced that the detention center contract would be awarded to Group 4, ACM’s new sister subsidiary.

Recently, ACM again came under fire—this time, for using tear gas to disperse detainees after fires were set at the Baxter detention center. While it is unclear what legal ramifications this recent incident poses for ACM, or the effect that ACM’s sale to Danish parent, Group 4 Falck, will have on detainees’ abilities to bring claims, it is plain that without minimum contacts with the U.S. forum, the United States will not have jurisdiction over ACM or Group 4 under the ATCA. Thus, Australian immigration detainees will no longer be able to contemplate bringing ATCA claims for future detention harms.

VII. CONCLUSION

Australian immigration detention is authorized by the Migration Act of 1958 and often results in harmful effects on detainees, particularly children. Although Australia’s mandatory detention policy has been criticized by detainees, Australian citizens, and overseas commentators, the government has been steadfast in its support, and has passed additional Migration Act amendments that have nearly foreclosed judicial review of migration decisions. Detainees and their families have sought domestic remedies, but their future success is unclear due to ineffective accountability mechanisms. Additionally, potential international claims under appropriate

---

224 Just months after its acquisition of Wackenhut Corrections Corporation, Group 4 Falck announced its plan to sell the company, citing Wackenhut’s bad reputation as a reason. Thea Williams & Robert Lusetich, ACM Parent Firm to be Cut Adrift, AUSTRALIAN, Dec. 24, 2002, LEXIS, News Library.
treaties can be difficult to enforce. Even the Alien Tort Claims Act, the scope of which has been expanded to reach those who merely aid and abet violations, is ineffective to redress human rights abuses. Obstacles in proving Wackenhut’s responsibility for the actions of its foreign subsidiary, ACM, make the ATCA an impracticable remedy for human rights violations incurred in Australian immigration detention. Finally, even if ATCA obstacles were absent, the question would remain whether the ATCA is a useful, let alone ideal, approach to the problem of human rights abuses in Australian immigration detention centers. The ATCA might provide temporary relief for detainees, but it does not eliminate the core problem. While it may be used to hold corporations like Wackenhut accountable for detention center harms, the ATCA does nothing to penetrate the problem of mandatory detention. Until Australia’s policy is dismantled, detainees’ suffering will not be fully remedied.