Factsheet
Offshore processing: Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea

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This factsheet replaces an earlier factsheet titled ‘Offshore Detention: Australia’s responsibilities’.

This factsheet sets out Australia’s responsibilities under international law towards asylum seekers and refugees that have been transferred from Australia to Nauru and Papua New Guinea (PNG). It starts with a general introduction to offshore processing, and explains what the concept of ‘State responsibility’ means under international law. It also explains the concept of ‘sovereignty’, and what sovereignty has to do with Australia’s legal obligations to asylum seekers and refugees offshore.

This factsheet explains that Australia has responsibility under international law when two criteria are met: (a) conduct affecting asylum seekers and refugees is ‘attributable’ to Australia, and (b) this conduct constitutes a breach of Australia’s international legal obligations. In considering the second of these two criteria, this factsheet distinguishes between Australia’s obligations that arise before asylum seekers have left Australian territory for Nauru or PNG (obligations of non-refoulement), and the obligations Australia owes to people it has already removed from its territory – both asylum seekers in detention and refugees in the community in Nauru and PNG.

Finally, this factsheet considers a number of related matters, such as how responsibility can be shared between more than one States, the consequences of State responsibility, and the separate but parallel issue of individual criminal responsibility.

This factsheet is part of a series on offshore processing, including factsheets on refugee status determination in Nauru and on Manus Island, a factsheet on conditions in the detention centres on Nauru and Manus Island, and an ‘in focus’ brief on the resettlement of refugees from Nauru to Cambodia.

1 Introduction

Since August 2012, asylum seekers who have arrived in Australia by boat have been subject to ‘offshore processing’ in Nauru and on Manus Island in PNG. In many ways this offshore or ‘regional’1 processing regime has reinstated a similar arrangement known as the ‘Pacific Solution’, which was formerly established by the Howard (Coalition) government and operated from 2001 to 2008.
All asylum seekers who have arrived by boat since August 2012 have undergone initial identity and health screening in Australia, and a determination has been made in each case as to whether they are fit to be sent offshore. Although all these asylum seekers have been liable to removal, in practice some have been exempted from removal and kept in Australia due to a lack of space in the offshore facilities or other reasons. Other asylum seekers have been brought back from Nauru or PNG and permitted to remain in Australia either temporarily or permanently. Asylum seekers in Nauru and PNG are detained in immigration detention centres while they are processed. After their claims have been processed, people recognised as refugees have been permitted to settle temporarily in the community in each country since May 2014 in Nauru, and January 2015 in PNG.

As a matter of international law, Australia cannot avoid or ‘contract out’ its international legal obligations to these asylum seekers and refugees simply by removing them from its territory, delegating asylum processing to other States, or outsourcing detention and care to private contractors. Instead, international law sets out clear rules governing the scope of Australia’s obligations towards these persons, and the circumstances in which it is responsible for failing to comply with them.

In brief, according to these rules, States must not send a person to any place where s/he will face a real chance of persecution or significant harm (refoulement). States also have human rights obligations towards persons outside their territories who are under their ‘effective control’, and therefore within their ‘jurisdiction’. Further, States may be responsible for wrongful acts under international law if they are involved in or assist with misconduct by another State. On these bases, there are a number of ways in which Australia may have responsibility under international law for asylum seekers and refugees in Nauru and PNG.

2 What is ‘State responsibility’?

In relation to Australia’s offshore processing regime, the term ‘responsibility’ gets used in a number of different ways. For instance, in each offshore processing country, a local government agency is said to have ‘administrative responsibility’ for the detention centre. In PNG, this agency is the Immigration and Citizenship Service Authority, and in Nauru it is the Department of Justice and Border Control. A number of companies and organisations are also ‘responsible’ for providing services in each centre, according to the terms of their contracts with the Australian government. In both these contexts, the term ‘responsibility’ is used to designate who is in charge of various tasks, and who might be held accountable under domestic law for any harm or injury arising from the performance of those tasks.

By contrast, ‘State responsibility’ is a distinct concept in international law. It refers to the legal rules governing when countries (States) are accountable for breaches of their international legal obligations. It is different from moral or practical responsibility, or responsibility under domestic law (although they may overlap at times). This factsheet considers only State responsibility under international law, in the specific context of Australia’s obligations towards asylum seekers and refugees it has transferred to Nauru and PNG.
A state is responsible for every ‘internationally wrongful act’ it commits, being any act which:

- is ‘attributable’ to the State under international law; and
- constitutes a breach of an international obligation of the State.\(^4\)

If both these conditions are met, a State will be responsible for the wrongful act under international law, even if the act was authorised by its domestic law.

### 3 What is ‘sovereignty’ and what does it have to do with Australia’s legal obligations to asylum seekers and refugees in Nauru and PNG?

Successive Australian governments have denied that Australia has responsibility under international law for the treatment of asylum seekers and refugees transferred to Nauru and PNG. However, it has never been made clear whether this view is based on: (a) a belief that the relevant conduct is not attributable to Australia; (b) a belief that the conduct does not constitute a breach of one of Australia’s international obligations; or (c) both of these beliefs. Instead, Australian governments have made general references to the sovereignty of Nauru and PNG as the main rationale for this view.

These references to sovereignty confuse two different concepts in international law. ‘Sovereignty’ is a term used to describe the fact, under international law, that all States are considered legally equal and independent, such that no State can exercise governmental, executive, legislative or judicial power over another. Sovereignty is closely linked to ideas of territoriality, since sovereign States are entitled to exercise exclusive control over their territory without interference from other States.\(^5\)

The concept of sovereignty is distinct from that of State responsibility (which is set out in Part 2 above). While respect for sovereignty requires Australia not to impose its laws on or exercise government functions in the territories of Nauru and PNG without their permission, it does not determine the scope of Australia’s human rights obligations towards persons in those territories. The scope of these obligations is determined by reference to international law and the rules of treaty interpretation.\(^6\) Sovereignty does not grant a licence for Australia, or any other State, to override international law and violate the human rights of certain persons simply because they are within the territory of another State.

The nature and scope of Australia’s obligations towards asylum seekers and refugees in Nauru and PNG are determined by reference to the rules of State responsibility: is the relevant conduct ‘attributable’ to Australia, and if so, does that conduct constitute a breach of Australia’s legal obligations under international law? These two questions are explored in Parts 4 and 5 below.
4 Is conduct affecting asylum seekers and refugees in Nauru and PNG ‘attributable’ to Australia?

4.1 Attribution generally

States ‘act’ through the conduct of persons, organs and entities acting on their behalf. International law contains clear rules to determine which conduct can and cannot be attributed to a State. Conduct which may be attributed to a State generally includes:

- conduct by any legislative, executive, judicial or other organ of the State, including the government, Parliament, individual Ministers, government departments and courts;
- conduct by any person or entity authorised by the State to exercise ‘elements of governmental authority’ (governmental authority may include certain powers relating to immigration, border control, arrest and detention); and
- other persons and entities who are acting on the instructions of, or under the direction or control of, the State in carrying out the conduct. 7

For the purposes of attribution it is irrelevant whether the person, organ or entity is acting inside or outside the State’s territory.

4.2 Attribution of conduct affecting asylum seekers and refugees in Nauru and PNG

The conduct of the Australian Immigration Minister, the Department of Immigration and Border Protection (DIBP) and DIBP officers,8 the Australian Parliament, the Australian Defence Force, the Australian Federal Police and any other government body will usually be attributable to Australia, regardless of whether it occurs in Australian territory, on the high seas or in the territory of an offshore processing country.

Examples of conduct by these people and bodies that is attributable to Australia include:

- the policy decision to remove asylum seekers to Nauru or PNG for detention and processing, rather than processing them in Australia;
- the choice of Nauru and PNG as ‘offshore processing countries’, and the specific choice of location sites for each detention centre;
- each separate decision to remove individual asylum seekers to Nauru or PNG (or to send them back there after a temporary return to Australia for medical or other purposes);
- the design, construction and maintenance of each centre;
- responses to requests for equipment, services and supplies;
- responses to requests for medical evacuations to Australia;
- responses to requests to relocate victims of sexual assault away from their attackers;
- age determinations of asylum seekers claiming to be minors;
- responses to allegations of physical and sexual abuse and other human rights violations within each centre;
• the content and manner of delivery of messages and information to asylum seekers in Nauru and PNG, to the extent that it is determined or carried out by DIBP officers or other persons acting on behalf of the Australian government;
• the choice of private contractors and oversight of their work; and
• all other operational and management decisions, to the extent that they are carried out by DIBP officers or other persons acting on behalf of the Australian government.

The conduct of private companies and organisations contracted by the Australian government to provide services in Nauru and PNG may also be attributable to Australia. These companies and organisations ‘act on the instructions’ of the Australian government, as represented by the DIBP. The instructions are set out in their contracts and also issued to them directly by DIBP officers in the course of their work. These companies and organisations also ‘act under the direction or control’ of the Australian government, which monitors their work closely through the DIBP. The conduct of Transfield and Wilson Security (and formerly G4S on Manus Island) may also be attributable to Australia on the basis that they are exercising elements of governmental control in detaining asylum seekers and providing all ‘garrison, operational and maintenance services’ at each centre.

Conduct that is attributable to Australia will only engage Australia’s responsibility under international law if it violates one of Australia’s international legal obligations. Part 5 considers when such conduct might do so.

5 Does conduct attributable to Australia breach its international legal obligations?

5.1 Identifying the legal obligations

As a responsible member of the international community and an active participant in international law processes, Australia has voluntarily assumed a range of human rights obligations under international treaties. In particular, Australia is a party to and legally bound by the 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol, and all the major human rights treaties. In 1954 that brought the treaty into force.

Extensive reports of wide-ranging and significant violations of the human rights of asylum seekers in detention in Nauru and PNG, and emerging reports of mistreatment of refugees in the community, suggest that any State with duties to respect and protect the rights of these individuals has breached a number of its international obligations. As discussed in Part 6.1 below, more than one State may have obligations towards these individuals under international law, and therefore more than one State may be responsible for any violations.

The critical question for present purposes is whether Australia is one such State, even though the persons concerned are outside Australian territory when their rights are violated. The following sections answer this question and explain why Australia is likely to have obligations towards these persons, both before (section 5.2) and after (section 5.3) they are removed from its territory.
5.2 Obligations relevant to the decision to remove asylum seekers from Australia

What are Australia’s obligations?

Australia has certain obligations under international refugee and human rights law that become relevant even before asylum seekers and refugees are transferred to Nauru and PNG.

Australia has obligations to ensure that every person it expels, extradites, deports or otherwise removes from its territory will be safe in the country to which s/he is removed, and will not subsequently be sent anywhere else where s/he may face a real risk of persecution or significant harm. These obligations arise inter alia from:

- the express prohibition on refoulement in the Refugee Convention, which prohibits States from expelling or returning asylum seekers and refugees to any place where their life or freedom will be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion;\(^\text{12}\)
- the express prohibition on refoulement in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which prohibits States from expelling or returning any person to a place where there are substantial grounds for believing that s/he will be in danger of being subjected to torture;\(^\text{13}\) and
- an implicit prohibition on refoulement in the International Covenant on Civil and Political Rights (ICCPR), which prohibits States from expelling or returning any person to a place where there are substantial grounds for believing that s/he will face a real risk of significant harm, including being exposed to arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment.\(^\text{14}\)

The Australian government acknowledges that it has these obligations under international law,\(^\text{15}\) and has incorporated them into domestic law to a certain extent.\(^\text{16}\) In order to comply with these obligations, Australia must carefully consider on a case-by-case basis the possible risks faced by each asylum seeker in Nauru or PNG, before it removes them.

Is Australia at risk of violating its non-refoulement obligations?

There are two main ways in which the removal of asylum seekers to Nauru or PNG may violate Australia’s non-refoulement obligations.

(i) Refoulement to conditions amounting to significant harm, including cruel, inhuman or degrading treatment

First, if violations of the human rights of detained asylum seekers reach a certain threshold – or ‘minimum level of severity’\(^\text{17}\) – they may amount to significant harm such that decisions by Australia to send asylum seekers offshore could constitute refoulement. The European Court of Human Rights has held that ‘the assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.’\(^\text{18}\) This
is why decisions to remove asylum seekers to Nauru or PNG must be considered on a case-by-case basis.

If conditions in detention are systematically so bad that they reach this threshold for all asylum seekers, there may be a presumption that every removal to an offshore processing country violates Australia’s non-refoulement obligations. In Europe there is currently a general presumption of this kind in relation to the return of asylum seekers to Greece.19 In January 2011, the European Court of Human Rights held that Belgium had violated its non-refoulement obligations towards an asylum seeker returned to Greece.20 The court considered reports that Greek authorities systematically placed asylum seekers in detention without informing them of the reasons for their detention, and reports of police mistreatment of detained asylum seekers, extreme overcrowding, dirty facilities, and inadequate access to mattresses, drinking water, toilets and soap. On the basis of these reports, the court held that:

*the conditions of detention experienced by the applicant were unacceptable … [T]aken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person’s dignity, constitute degrading treatment.*21

The court held that since these conditions ‘were well known before the transfer of the [asylum seeker] and were freely ascertainable from a wide number of sources’, Belgium had ‘knowingly exposed [the asylum seeker] to conditions of detention and living conditions that amounted to degrading treatment’.22

In light of this judgment, many European countries stopped returning asylum seekers to Greece as a matter of practice, on account of the risk that such returns might expose asylum seekers to cruel, inhuman or degrading treatment in violation of the returning State’s non-refoulement obligations.

The question whether conditions in the Nauru and PNG offshore detention centres are comparable to those in Greece, and therefore justify a blanket suspension of removals, would need to be assessed after thorough consideration of the facts. Importantly, this assessment may change over time. It is possible that detention conditions have reached the threshold to constitute significant harm at certain times (for example, when the offshore detention centres first opened and construction was incomplete, or in periods of extreme overcrowding), whereas at other times they have not.

Alternatively, even if conditions in the offshore detention centres on Nauru and PNG do not reach the minimum level of severity necessary to constitute cruel, inhuman and degrading treatment for all asylum seekers, removal to these centres may nevertheless constitute refoulement in certain individual cases. Poor conditions in detention may disproportionately affect vulnerable asylum seekers, including children, pregnant women, families, survivors of torture and persons with physical or mental health conditions that cannot properly be treated in Nauru or PNG. For these groups, the cumulative effects of detention in Nauru or PNG may reach the necessary threshold of severity to constitute cruel, inhuman or degrading treatment, even if they would not for other asylum seekers.
The European Court of Human Rights has made similar findings in a number of cases. For example, in November 2014 the court held that while the quality of reception and accommodation arrangements for asylum seekers in Italy were not so bad as to justify a general suspension of removals to Italy (of the kind that exists in relation to Greece), they might prohibit the removal to Italy of an asylum seeker family with young children. The court held that Switzerland would violate its non-refoulement obligations if it were to send the family back to Italy without first receiving guarantees from the Italian authorities that the family would be kept together in conditions appropriate to the ages of the children. Absent these guarantees, no removal could take place. In light of the reported detention conditions for children and families in Nauru, it is arguable that a similar prohibition on the removal of families with children should be applied in relevant cases.

(ii) Refoulement to the risk of persecution

Second, the removal of certain asylum seekers may violate Australia’s non-refoulement obligations as a result of persecution in Nauru or PNG. For example, there are reports that homosexual and Muslim asylum seekers may face persecution in PNG on the basis of their sexuality or religion. The likelihood of such persecution must be assessed in each individual case, with any asylum seeker found to be at risk exempted from removal offshore. It has been reported that asylum seekers with a fear of persecution in PNG may not always be individually assessed or exempted from removal. If these reports are correct, such failures to consider each asylum seeker’s risk of persecution in Nauru or PNG would constitute a violation of Australia’s non-refoulement obligations.

5.3 Obligations relevant to the treatment of asylum seekers/refugees in Nauru and PNG

Can States have extraterritorial human rights obligations?

Yes. As a general rule, a State that is a party to a human rights treaty is bound to respect and uphold the rights contained in that treaty for all persons within the State’s ‘jurisdiction’. Traditionally a State’s jurisdiction, for the purposes of its human rights obligations, was assumed to be limited primarily, if not exclusively, to its territory. This emphasis on territoriality was intended to ensure that unreasonable burdens were not placed on States, since States only have the power to make and enforce laws within their own territory, and not in that of another sovereign State.

However, as international human rights law has evolved, this traditional view has given way to recognition that a State’s jurisdiction, for the purposes of its human rights obligations, is not necessarily identical to its jurisdiction (that is, power) as a sovereign State. In other words, the fact that Australia cannot legislate, govern or enforce its laws in Nauru or PNG does not mean that it can act without regard for the human rights implications of its actions on asylum seekers and refugees transferred to those States.

Instead, it is now accepted that a State’s jurisdiction for human rights purposes can extend to persons outside its territorial limits. For example, the Inter-American Commission on Human Rights has stated in relation to the American Convention on Human Rights:
the term ‘jurisdiction’ in the sense of Article 1(1) is [not] limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s territory.\textsuperscript{28}

This broader understanding of jurisdiction has been affirmed by the UN Human Rights Committee,\textsuperscript{29} the UN Committee against Torture,\textsuperscript{30} the International Court of Justice\textsuperscript{31} and the European Court of Human Rights.\textsuperscript{32} This understanding reflects the fact that it would be inconsistent with the obligations States assume under human rights treaties for them to commit violations overseas which they could not commit in their own territory,\textsuperscript{33} especially since treaty obligations must be interpreted and performed in good faith.\textsuperscript{34}

\textit{When does a State have jurisdiction over persons outside its territory?}

A State is generally considered to have jurisdiction over persons outside its territory if it has a certain degree of power, authority or ‘effective control’\textsuperscript{35} over them, or over the territory in which they are located. According to the UN High Commissioner for Refugees (UNHCR):

\textit{It is generally recognised that a State has jurisdiction, and consequently is bound by international human rights and refugee law, if it has \textbf{effective de jure} [legal] \textit{and/or de facto} [actual] \textbf{control over a territory \textit{or} over persons}. The existence of jurisdiction under international law does not depend on a State’s subjective acknowledgment that it has jurisdiction. Jurisdiction is established as a matter of fact, based on the objective circumstances of the case.}

This means that ‘State ‘A’ may have jurisdiction over – and responsibilities under international law towards – people who are on the territory of State ‘B’ if State A nonetheless has de facto control over those people or the area where they are located (e.g. where State A runs reception arrangements or asylum procedures on the territory of State B).\textsuperscript{36}

More specifically, in relation to bilateral agreements for the transfer of asylum seekers between States (such as those between Australia/Nauru and Australia/PNG), UNHCR affirms that:

\textit{In terms of State responsibility post-transfer, at a minimum, and regardless of the arrangement, the transferring State remains, inter alia, subject to the obligation of non-refoulement. In addition, the transferring State may retain responsibility for other obligations arising under international and/or regional refugee and human rights law. This would be the case, for example, where the reception and/or processing of asylum-seekers in the receiving State is effectively under the control or direction of the transferring State.}\textsuperscript{37}

In a number of cases, States have been found to have a sufficiently high level of control over persons outside their territory to trigger their jurisdiction and human rights obligations. For example:
• in the case of Al-Saadoon, the European Court of Human Rights held that the United Kingdom had jurisdiction over two Iraqi citizens held in a detention facility within Iraq, because of the ‘total and exclusive’ control of the United Kingdom authorities over the premises and the persons detained there;\(^{38}\)

• in the case of in Medvedyev, the European Court of Human Rights held that France had jurisdiction over the crew members detained on board a ship which French authorities intercepted and took control of, despite the fact that they would otherwise have been under the jurisdiction of Cambodia since it was the flag State of the vessel, meaning the vessel was registered in Cambodia;\(^{39}\)

• in the case of JHA, the UN Committee against Torture held that Spain had jurisdiction over a group of migrants from the time they were rescued in international waters and throughout the subsequent identification and repatriation process, including while some were detained in a former fish-processing plant in Mauritanian territory;\(^{40}\)

• in the cases of López Burgos and Lilian Celiberti de Casariego, the UN Human Rights Committee held that Uruguay had jurisdiction over two Uruguayan citizens when it arrested them in the territories of two other States – Brazil and Argentina;\(^{41}\)

• in the case of Hirsi, concerning the interception at sea and return of migrants to Libya, the European Court of Human Rights held that Italy had jurisdiction over migrants detained on Italian military, revenue police and coastguard ships when they were outside Italian territory;\(^{42}\) and

• in the case of Djamel Ameziane, the Inter-American Commission on Human Rights held that the United States had jurisdiction over an Algerian citizen from the moment he was arrested by the US military in Pakistan, throughout his detention by US authorities in a prison at their airbase in Afghanistan, and during his continued detention by the US at Guantanamo Bay, Cuba.\(^{43}\)

These cases demonstrate that there are a range of factual situations in which States can have human rights obligations towards persons outside of their territory. Successive Australian governments have acknowledged that States’ human rights obligations may extend extraterritorially, but argue that this only applies in exceptional circumstances when they exercise a ‘very high level’ of effective control over persons or territory abroad.\(^{44}\) As the UN Committee against Torture has noted, this threshold of a ‘very high level’ of effective control appears to be a more stringent test than the general test of effective control or authority, and may constitute a misinterpretation of international law (see next page for more information).\(^{45}\)

\(\text{Does Australia have human rights obligations with respect to asylum seekers in Nauru and PNG?}\)

A lack of transparency about the internal management of offshore detention centres in Nauru and PNG makes it difficult to establish the exact nature of Australia’s control over asylum seekers detained there. Nevertheless, the available evidence suggests that Australia is exercising effective control over these asylum seekers and has the power to affect their enjoyment of rights.\(^{46}\) Relevantly:
• the only reason asylum seekers are in detention and at risk of human rights violations in Nauru or PNG is because Australia forcibly sent them there;
• certain decisions made by Australian authorities have created or exacerbated the risks of harm in offshore detention centres, for example the decision to start sending asylum seekers to Nauru and PNG before construction of the centres was complete, or in such numbers as to cause overcrowding;
• Australian authorities exercise a considerable degree of control and enjoy substantial decision-making powers in relation to asylum seekers detained offshore, and therefore have a significant and direct impact on their enjoyment of rights (some of the powers exercised by Australian authorities over asylum seekers in detention are set out in Part 4.2 above); and
• Australian DIBP officers have either conducted or closely supervised the refugee status determination processes in both offshore processing countries.47

These factors support the conclusion that Australia exercises sufficient authority and control over asylum seekers detained in Nauru and PNG to enliven its jurisdiction for human rights purposes.

However, successive Australian governments have sought to argue otherwise. Despite the former Immigration Minister Scott Morrison acknowledging that he had ‘responsibility’ for upgrading the Nauru and Manus Island centres and getting them ‘in[to] a far better shape’, as well as for their security and capacity issues,48 at other times he and other representatives of the Gillard (Labor) and Abbott (Coalition) governments have argued that the centres are wholly a matter for Nauru and PNG.49 These arguments are generally based on a combination of:

• general references to sovereignty and territoriality (in other words, Australian governments have argued that the fact that asylum seekers and refugees are located in the territory of other sovereign States is sufficient to negate the possibility of Australia owing them human rights obligations); and
• the assertion that Australia does not have the ‘very high level’ of effective control necessary to establish its jurisdiction over asylum seekers and refugees offshore.

In relation to the first of these points, for the reasons set out in the previous sections, the scope of Australia’s obligations under international law is determined by reference to jurisdiction and effective control, not sovereignty and territoriality.

In relation to the second point, in 2014 the UN Committee against Torture challenged Australia on its interpretation and application of the effective control test. The Committee argued that the ‘very high level of control’ test proposed by Australia is different from – and higher than – the established international law test of general authority, power and effective control.50 It went on to state that it was ‘not convincing’ for Australia to claim it did not have jurisdiction over asylum seekers detained in Nauru and PNG;51 that the removal of asylum seekers to those countries did not release Australia from its obligations to them under the CAT; and that these asylum seekers remained under Australia’s effective control ‘because
… they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice.52

UNHCR has also repeatedly stated that Australia has human rights obligations towards asylum seekers in offshore processing countries.53 Additionally, in December 2014, an Australian Senate Committee inquiry into the February 2014 riot in the Manus Island detention centre reported that:

The evidence provided to the committee by experts in international human rights law in relation to this issue was unequivocal in stating that Australia was, at the time of the disturbances in February 2014, and still is, exercising effective control with respect to the Manus Island RPC and the individuals held there. The committee considers that the degree of involvement by the Australian Government in the establishment, use, operation, and provision of total funding for the 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.54

The experts in international human rights law who provided written opinions and oral testimony to this Senate inquiry include UNHCR, the Kaldor Centre, the Human Rights Law Centre, the Castan Centre for Human Rights Law at Monash University, and the Australian Human Rights Commission.55

It is relevant to note that a finding that Australia has extraterritorial human rights obligations does not require it to have completely replaced the authority of Nauru and PNG over the centres and persons within their territories. This point is relevant in light of conflicting reports about the extent to which Nauruan and PNG government bodies are actually involved in the administration of each centre. Australia need not have exclusive control over every aspect of an asylum seeker’s life, to the exclusion of any other State, in order to have responsibility for those aspects which it does control. For more information about State responsibility where more than one State acts, see Part 6.1 below.

**Does Australia have human rights obligations with respect to refugees settled in Nauru and PNG?**

Australia continues to have certain obligations under international law to refugees settled in the community in Nauru and PNG, even though they are not under the authority and control of Australia in the same way as asylum seekers in detention.

According to UNHCR, when asylum claims are processed under the joint responsibility of several States, in processing centres located in the territory of one or more of the participating States:

> Responsibility for the identification and implementation of solutions for those in need of international protection and resolution for others would remain with all States involved in the regional processing arrangement.56
Specifically in relation to the proposed temporary settlement of recognised refugees in PNG, UNHCR has stated that:

*Until safe and sustainable durable solutions are found in PNG or elsewhere, the safety and protection of refugees must remain the shared responsibility of the two States in accordance with the 1951 Refugee Convention.*

This statement applies equally to the obligations of Australia and Nauru towards refugees who are settled in Nauru, even temporarily.

Accordingly, both Australia and either Nauru or PNG have obligations to find a durable solution for every asylum seeker found to be a refugee (or otherwise in need of international protection, such as complementary protection). To date this obligation has not been discharged for any refugee in either Nauru or PNG. Refugees in Nauru have been allowed to settle locally on a temporary basis for a maximum of five years, whereas refugees in PNG have been allowed to settle locally in the town of Lorengau on Manus Island for a maximum of 12 months. Despite the existence of an agreement between Australia and Cambodia under which some refugees may volunteer to resettle in Cambodia, as of March 2015 no refugee has volunteered for this solution. There is no other system in place for identifying and implementing effective, permanent and complete solutions for refugees processed offshore.

For as long as refugees remain in the community in Nauru or on Manus Island, waiting for a durable solution to be found, they are the responsibility of both Australia and the host State. If these refugees face a real risk of persecution or significant harm, and their safety cannot be ensured, their temporary stay in an offshore processing country will not be an appropriate solution even in the short term. In such cases it is incumbent upon Australia to arrange an alternative interim solution, in conjunction with the offshore processing country that is hosting the refugee. The most practical alternative solution may be to bring the refugee back to Australia until a durable solution can be found.

### 6 Related matters

#### 6.1 Shared responsibility between States

Since a State’s obligations do not end at its territorial limits, and in light of increasing cooperation between States on immigration and other matters, there are many situations in which two or more States may have overlapping or concurrent responsibility for internationally wrongful acts.

States may have shared or joint responsibility where one State is implicated in the wrongful conduct of another State. For example, a State will have responsibility if it aids, assists, directs, controls or coerces another State to commit an internationally wrongful act, with knowledge of the circumstances of the internationally wrongful act. This rule means that States cannot ‘contract out’ their international obligations to other States, or evade their obligations by getting another State to do what it could not do itself.
Other examples of situations in which States may share or have joint responsibility include where:

- two or more States act through a body or entity set up under their joint command;
- two or more States act together in committing an internationally wrongful act (for example where they act concertedly in creating and implementing laws and policies which violate their international obligations); or
- two or more States act independently in committing internationally wrongful acts which have a cumulative harmful effect (for example, where one State is responsible for arbitrarily detaining asylum seekers, and another State is responsible for their mistreatment while in detention).

Relevantly, these are separate and additional grounds for establishing a State’s responsibility to those set out in Part 5.3 above. That is to say, even if the Australian government continues to assert that asylum seekers and refugees in Nauru and PNG are the primary responsibility of those States, this assertion does not address the possibility that Australia may also have shared or joint responsibility.

UNHCR has repeatedly stated that both Australia and either Nauru or PNG have ‘shared and joint responsibility’ to ensure that the treatment of all asylum seekers and refugees in each offshore processing country is fully compatible with their respective obligations under international law.\(^6\) In light of Australia’s complete funding of the offshore processing regime, the fact that contracts for the provision of services in each detention centre are concluded with the Australian government, and the very significant role of DIBP officers in overseeing the operation of the centres, it appears evident that Australia is, at the very least, aiding and assisting (if not directing and controlling) Nauru and PNG in operating a regime that entails violations of international law.

### 6.2 Consequences of State responsibility

If a State is responsible for an internationally wrongful act, the consequences of that responsibility will depend on the nature of the particular obligation that has been breached.

Under international human rights law, States are generally required to ensure that any person in their jurisdiction whose rights or freedoms are violated has access to an ‘effective remedy’, regardless of whether the violation was caused by the State or another person. If the State itself is responsible for a human rights violation, examples of an effective remedy include ceasing the wrongful conduct and offering financial compensation to the injured persons. If an offending State fails to do so, an individual or group of individuals affected by the violation may be able to bring a claim against the State before the UN body responsible for overseeing the human rights treaty that has been breached. There are ten UN treaty bodies composed of independent experts that monitor implementation of the core international human rights law treaties, six of which have the capacity to receive individual complaints.\(^6\)
As a State party to the *Optional Protocol to the International Covenant on Civil and Political Rights*, Australia has voluntarily recognised the competence of the UN Human Rights Committee to receive and consider complaints from individuals subject to Australia’s jurisdiction who claim to have had their rights under the ICCPR violated by Australia. States are expected to treat the Committee’s decisions regarding these complaints as authoritative determinations concerning the interpretation of the ICCPR, and to respect and implement them in good faith. However, Australia does not always do so.

For example, in 2013 the UN Human Rights Committee made findings against Australia in two cases concerning 42 adult asylum seekers who were recognised as refugees, but refused visas and held in immigration detention in Australia following adverse security assessments by the Australian Security Intelligence Organisation (ASIO). None of the refugees were provided with a statement of reasons for their adverse security assessments. The Committee found Australia responsible for numerous violations of its obligations to the refugees under the ICCPR, and noted that Australia was under an obligation to provide an effective remedy for these violations. In particular, the Committee ordered Australia to release any of the refugees still in detention under ‘individually appropriate conditions’, provide them with rehabilitation and appropriate compensation, and take steps to prevent similar violations in the future. The Committee concluded that it wished to receive information from Australia within 180 days about the measures taken to give effect to its views. The Australian Government did not reply to the Committee until almost one year after its response was due, and when it did it rejected the Committee’s findings in their entirety.

Despite the lack of success in achieving an outcome in these cases, it remains possible that an individual or group of individuals affected by the offshore processing regime may bring a claim against Australia before a UN body such as the UN Human Rights Committee or the UN Committee against Torture. If one of these committees were to find that Australia had breached its international obligations, Australia would have a duty to respect the international processes it has voluntarily agreed to be bound by, and bring its law and policies into line with international law accordingly.

### 6.3 Individual criminal responsibility

As an additional and separate matter to State responsibility, individuals may be personally and criminally responsible for certain acts which constitute crimes under international law, even if they are acting on behalf or on the instructions of a State in carrying out the crimes. In particular, persons who are involved in acts of genocide, war crimes and crimes against humanity may be individually responsible and subject to criminal charges in domestic and international courts.

In October 2014, Andrew Wilkie MP requested that the Prosecutor of the International Criminal Court (ICC) launch an investigation into the alleged individual criminal responsibility of Prime Minister Tony Abbott and all 19 members of his Cabinet for their possible involvement in crimes against humanity in relation to the treatment of asylum seekers and refugees in Australia. While it is unclear whether any action will be taken by the ICC, it is important to note that if an Australian law or policy were considered to amount to a crime
against humanity, any individual involved in implementing that law or policy could be found to be individually criminally responsible for their actions.

Further information

For more information or queries about State responsibility and offshore processing, please contact Madeline Gleeson, Director of the State Responsibility and Borders Project, at madeline.gleeson@unsw.edu.au.

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Endnotes

1 The Australian government often refers to the offshore regime as ‘regional processing’, however it may be better described as a set of two bilateral agreements between Australia/Nauru and Australia/PNG rather than a truly ‘regional’ or burden-sharing arrangement. While ‘regional processing’ may take many forms, UNHCR generally describes it as ‘involving joint processing carried out by several transit or destination States. It could be appropriate in the event of large numbers of claims being made in several States but arising from the same situations or particular migratory routes. It could also be appropriate where there is a concern about managing responsibility for asylum processing and solutions more evenly between, or with more consistency among, destination States in a particular region’: UNHCR, Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing, Protection Policy Paper, November 2010, http://www.refworld.org/pdfid/4cd12d3a2.pdf (Maritime Interception Operations and the Processing of International Protection Claims), pp. 14-15.


5 The fact that a State has ‘sovereignty’ does not mean that it is free to act completely without restraint in relation to persons within its jurisdiction. International, domestic and other laws place limits on how States can act. A State’s action may be limited in these ways without its sovereignty being affected.

6 The nature and scope of State obligations under a treaty are determined by interpreting the treaty’s terms in good faith, according to their ordinary meaning, and in light of their context and the treaty’s object and purpose: Vienna Convention on the Law of Treaties, art. 31(1).

7 Responsibility of States for Internationally Wrongful Acts, arts. 4, 5, 7 and 8.

8 The DIBP was formerly the Department of Immigration and Citizenship (DIAC) at the time the offshore processing regime was re-established in August 2012 and until the Abbott (Coalition) government came to power in September 2013.

9 These treaties include the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child; International Convention on the Elimination of All Forms of Racial Discrimination and Convention on the Rights of Persons with Disabilities.


12 Refugee Convention, art. 33(1).

13 CAT, art. 3.

14 The UN Human Rights Committee has affirmed that ‘the article 2 obligation requiring that States Parties respect and ensure the [ICCPR] rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.’ UN Human Rights Committee, General Comment no. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, http://www.refworld.org/docid/478b26ae2.html, para. 12.


16 Australia’s non-refoulement obligations are incorporated into domestic law through provisions of the Migration Act 1958 (Cth) which allow for the grant of a protection visa to a person who is owed protection obligations under the Refugee Convention, or who would face a real risk of significant harm if removed from Australia (see, for example, s. 36 of the Migration Act). For an analysis on how the incorporation of Australia’s non-refoulement obligations into domestic law is imperfect, and how the Migration Act may not in fact provide protection to all those who are entitled to it under international law, see Part 5 of the joint submission of the Kaldor Centre and Associate Professor Michelle Foster to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), available at http://www.kaldorcentre.unsw.edu.au/Submission_Legacy_Caseload.

17 MSS v Belgium and Greece [GC], no. 30696/09, §219, ECHR 2011 (MSS v Belgium and Greece).

18 Ibid.

19 In Europe there is a formal system for identifying which Member State of the European Union is responsible for examining an asylum claim (the Dublin System). If an asylum seeker moves on from the State responsible for the claim to another State, and tries to lodge an asylum application there, that State may be entitled to return the asylum seeker to the original State responsible for the claim. In cases such as MSS v Belgium and Greece, however, the European Court of Human Rights has held that this system for determining which State should examine an asylum claim does not override the non-refoulement obligations contained in the European Convention on Human Rights. For more information, see: ECRE, ‘Dublin Regulation’, undated, http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html.

20 MSS v Belgium and Greece.

21 Ibid., para. 233.
In 2013 Amnesty International interviewed a number of asylum seekers in the Manus Island detention centre, and reported: 'one detainee informed us that he was asked on Christmas Island, prior to transfer, whether there was any reason he should not be sent to Manus Island. He objected on the grounds of his sexual orientation— the basis for his asylum claim—even with a pre-existing health condition. He said, 'The staff were sympathetic but told me I was going [to Papua New Guinea] anyway': Amnesty International, This is Breaking People, p. 74.

Some human rights treaties specify that the obligations they contain extend to the protection of persons within the State’s territory or jurisdiction; see for example, ICCPR, art. 2(1); Convention on the Rights of the Child, art. 2(1). While Article 2(1) of the ICPR refers to ‘individuals within [a State’s] territory and subject to its jurisdiction’ (emphasis added), the UN Human Rights Committee has clarified that the obligations of State parties extend both to individuals within a state’s territory and also to those who are outside of its territory but nevertheless subject to its jurisdiction: UN Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, http://www.refworld.org/docid/478b26ae2.html, para. 10. Others human rights treaties are silent on the issue of their scope, but are generally also interpreted as applying to persons in a State’s territory or jurisdiction.

The UN Human Rights Committee affirms that a State party to the ICCPR ‘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’: UN Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, http://www.refworld.org/docid/478b26ae2.html, para. 10 (emphasis added).

The UN Committee against Torture has affirmed that the provisions of the CAT which apply to ‘territory under the jurisdiction’ of a State party are not ‘geographically limited to its own de jure territory’, but rather include ‘all areas under the de facto effective control of the State party’ and ‘situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention’: UN Committee against Torture, Conclusions and Recommendations of the Committee against Torture: United States of America, CAT/C/USA/CO/2, July 25, 2006, para. 15. See also: UN Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, para. 16.


See, for example, Loizidou v Turkey [GC], no. 15318/89, §52, ECHR 1996-VI.

The UN Human Rights Committee has stated that ‘it would be unconscionable to so interpret the responsibility [of a State] as to permit a State party to perpetrate violations of the [ICCPR] on the territory of another State, which violations it could not perpetrate on its own territory’. Sergio Euben Lopez Burgos v. Uruguay, UN Human Rights Committee, CCPR/C/13/D/52/1979, 29 July 1981, para 12.3; Lilian Celiberti de Casaresi v. Uruguay, UN Human Rights Committee, CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3. In the more recent case of Issa, the European Court of Human Rights agreed that a State can be held accountable for extraterritorial human rights violations of persons under its authority or control because '[a]ccountability in such situations stems from the fact that [the European Convention on Human Rights] cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory': Issa v. Turkey, no. 31821/96, §71, ECHR 2004.


The concept of ‘effective control’ in the context of the scope of human rights obligations is different from the concepts of effective control used in other areas of international law, such as in relation to belligerent occupation
under international humanitarian law or the effective control test elaborated by the International Court of Justice in relation to attributing the conduct of private actors to a State.

36 UNHCR, Maritime Interception Operations and the Processing of International Protection Claims, paras. 10, 11 (emphasis in original).


38 While initially this detention occurred in the context of the United Kingdom’s military occupation of Iraq, it continued for several years after the new Iraqi government assumed full sovereign responsibility and authority over the State, and consented to the ongoing presence and activities of United Kingdom forces: Al-Saadoon and Mufdhi v. United Kingdom (dec.), no. 61498/08, §87-88, ECHR 2009. The Court emphasised the fact that ‘the [United Kingdom’s] armed forces, having entered Iraq, took active steps to bring the applicants within the United Kingdom’s jurisdiction, by arresting them and holding them in British-run detention facilities’, and that as a result the United Kingdom ‘was under a paramount obligation to ensure that the arrest and detention did not end in a manner which would breach the applicants’ rights’: Al-Saadoon and Mufdhi v. United Kingdom, no. 61498/08, §140, ECHR 2010.

39 Medvedyev & Ors v. France [GC], no. 3394/03, ECHR 2010.


42 Hirsi Jamaa & Ors v Italy [GC], no. 27765/09, §76-82, ECHR 2012.


44 In oral evidence before the UN Committee against Torture on 11 November 2014, the Australian delegation asserted that a ‘very high level’ of effective control would be necessary to establish a State’s jurisdiction extraterritorially, and indicated that control is based on who is exercising governmental functions in the territory in question: see live twitter coverage of the sessions by Madeline Gleson (@madelineglesson) and retweeted by the Kaldor Centre (@kaldorcentre) on 10 and 11 November 2014. Previously, in its formal statement to the UN Human Rights Committee in 2009, Australia stated in relation to the ICCPR: ‘Australia accepts that there may be exceptional circumstances in which the rights and freedoms set out under the Covenant may be relevant beyond the territory of a State party (although notes that the jurisdictional scope of the Covenant is unsettled as a matter of international law). Although Australia believes that the obligations in the Covenant are essentially territorial in nature, Australia has taken into account the Committee’s views in General Comment No. 31 on the circumstances in which the Covenant may be relevant extraterritorially. Australia believes that a high standard needs to be met before a State could be considered as effectively controlling territory abroad’: UN Human Rights Committee, Replies to the List of Issues (CCPR/C/AUS/Q/5) To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5), CCPR/C/AUS/Q/5/Add.1, 5 February 2009, paras. 16-17.

45 See text accompanying notes 50-52.

46 The UN Human Rights Committee has affirmed that the ICCPR applies to all State conduct that ‘affects the enjoyment of rights’: UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Israel, CCPR/CO/78/ISR, August 21, 2003, para. 11.


48 The following exchange took place at a press conference in February 2014:

Journalist: Minister, in light of the Nauruan riots under Labor, you said that Labor should shoulder responsibility for the riots saying it was sparked by asylum seekers' frustration that their claims had not yet been processed. Given the people on Manus Island have also been in limbo, should you now take responsibility for these riots?

Minister Morrison: I do take responsibility for things that happen within my portfolio under my
management... that's why since we came into office, I've been taking steps every day to try and upgrade and get the offshore processing facilities in a far better shape. And that in particular required us to address some immediate security issues at the centre and also to deal with what was a very significant underfunding and under-capacity issue at those centres.


59 Former Immigration Minister Scott Morrison repeatedly asserted that the treatment of asylum seekers in Nauru and PNG are wholly matters for those countries alone, see for example: Scott Morrison MP, ‘Interview with Fran Kelly’, ABC Radio National Breakfast, 7 March 2014, audio available at: http://www.abc.net.au/radionational/programs/breakfast/scott-morrison/5304954 at 8:55 (the Manus Island detention centre ‘is not run by the Australian Government... it is run by the government of Papua New Guinea and it is their sovereign jurisdiction’). Previously, in December 2012 under the Gillard government, a representative of the Department of Immigration and Citizenship stated that '[the] regional processing centres are a matter for the Nauruan and Papua New Guinean governments as these centres are located in their sovereign territory', and agreed with Senator Wright’s phrase that ‘there is no effective control, because it is a sovereign nation’: Parliamentary Joint Committee on Human Rights, Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related bills and instruments, Official Committee Hansard, 19 December 2012, pp. 41, 44.

50 Questions from the UN Committee against Torture in response to oral evidence of Australia, in relation to the consideration of the 5th periodic report of Australia to the UN Committee against Torture (CCPR/C/AUS/5), Geneva, 11 November 2014, live tweeted by Madeline Gleeson (@madelinegleeson) and retweeted by Kaldor Centre (@kaldorcentre). See, for example, https://twitter.com/madelinegleeson/status/532197736095817728.

51 Ibid. See, for example, https://twitter.com/madelinegleeson/status/531741600409313792.


55 The written submissions of these organisations and transcripts of public hearings of the Senate inquiry are available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island.

56 UNHCR, Maritime Interception Operations and the Processing of International Protection Claims, para. 54.

57 UNHCR, Visit to Manus Island – October 2013, p. 3.


59 This point was emphasised by the Grand Chamber of the European Court of Human Rights in 2012 where, in a case concerning Italy’s transfer of irregular migrants to Libya, the Court held that Italy could not contract out its international obligations via a bilateral agreement with another State: Hirsi Jamaa & Ors v Italy [GC], no. 27765/09, §129, ECHR 2012.

60 See, for example, Senate Legal and Constitutional Affairs References Committee, Inquiry into Manus Island Incident; paras. 7.36-7.39 and references cited therein. See also: UNHCR, Visit to Nauru – December 2012, p. 1; UNHCR, Visit to Nauru – October 2013, para. 22; UNHCR, Visit to Manus Island – January 2013, para. 22; UNHCR, Visit to Manus Island – October 2013, para. 16.

61 The committees that can receive individual complaints are the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination, the UN Committee on the Elimination of Discrimination against Women, the UN Committee against Torture, the UN Committee on the Rights of Persons with Disabilities and the UN Committee on Enforced Disappearances. For more information see UN Office of the High Commissioner for Human Rights, ‘Monitoring the core international human rights treaties’, undated, http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.
The complaints were also made in the names of four children who accompanied these adult refugees to Australia or were born in detention in Australia, but were subsequently granted protection visas.

The Committee found, *inter alia*, that Australia had violated its obligations under the ICCPR because the refugees' indefinite detention was unlawful and arbitrary, they had no opportunity to challenge their detention under Australian law, and 'the combination of the arbitrary character of the [refugees'] detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the [refugees] and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them', constituting cruel, inhuman or degrading treatment: *FKAG v Australia*, paras. 10.4, 10.6 and 10.7; *MMM v Australia*, paras. 10.4, 10.6 and 10.7.


*Andrew Wilkie MP, Letter to the Office of the Prosecutor of the International Criminal Court, 22 October 2014, [http://www.andrewwilkie.org/content/pdf/Andrew_Wilkie_Letter_to_the_ICC.pdf](http://www.andrewwilkie.org/content/pdf/Andrew_Wilkie_Letter_to_the_ICC.pdf).*