

Research Brief

AUSTRALIA'S RESPONSIBILITY FOR OFFSHORE PROCESSING ON NAURU AND MANUS ISLAND

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Introduction

Since 13 August 2012, asylum seekers who have arrived in Australia by boat (or who have been intercepted at sea and brought to Australia) without a valid visa have been subject to ‘offshore processing’ in the Pacific nations of Nauru and Papua New Guinea (PNG). In practice, people have been transferred offshore in two cohorts: a first cohort of people who arrived in Australia between August 2012 and July 2013, some of whom were sent offshore and then brought back to Australia to be processed through the ‘fast track’ processing system; and a second cohort who arrived in Australia after 19 July 2013, were sent offshore for processing, and are subject to a permanent ban on settlement in Australia.

All asylum seekers and refugees transferred to Nauru and PNG underwent initial identity, health and security screening in Australia, and had their fitness for removal determined on a case-by-case basis. Australian government records show that no new asylum seekers have been transferred from Australia to PNG or Nauru since 2014¹ (instead, asylum seekers trying to reach Australia by boat have been turned back at sea or otherwise returned to their countries of origin). However, as of 2018 a large number of the people previously transferred offshore remained there, meaning the question of which State was (or which States were) responsible for them remained relevant.

As a matter of international law, Australia cannot avoid or ‘contract out’ its international legal obligations to asylum seekers and refugees simply by removing them from its territory, delegating asylum processing to other States, or outsourcing the operation of detention centres to private contractors. Instead, international law sets out the scope of Australia’s obligations towards these persons, and the circumstances in which it will incur responsibility for failing to comply with them. In brief, States must not send a person to any place where he or she will face a real risk of persecution or significant harm (*refoulement*). States may also continue to have human rights obligations towards people after they have been removed from their territories, for example where the State continues to exercise ‘effective control’ over them, thereby bringing them within the State’s jurisdiction. If a State breaches these obligations, it may be responsible under international law. A State’s responsibility may also be engaged if it aids or assists another State in the commission of an internationally wrongful act. These rules are explored further below.

What is ‘State responsibility’?

The term ‘responsibility’ is used in a number of different ways in relation to Australia’s offshore processing regime. For instance, in each offshore processing country, a local government agency is said to have ‘administrative responsibility’ for the detention centre. A number of companies and organisations are also ‘responsible’ for providing services in each centre, according to the terms of their contracts. 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 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 the asylum seekers and refugees it transferred to Nauru and PNG.

Under international law, 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.²

If both these conditions are met, a State will have responsibility, even if the act was authorised by its domestic law.

'Sovereignty' and State responsibility

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. Instead, Australian governments have general referenced Nauru and PNG's 'sovereignty' as an explanation for why they do not consider Australia to be responsible under international law.

These references to sovereignty confuse two different concepts in international law. 'Sovereignty' is a term used to describe the fact that, under international law, 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. However the fact that a State has sovereignty over its territory (and, in certain circumstances, extraterritorially) does not mean that it is free to act completely without restraint. International, domestic and other laws place limits on what States can do, and their action may be limited in these ways without their sovereignty being affected or impaired.

The concept of sovereignty is distinct from that of State responsibility. 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.³ 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.

What conduct is 'attributable' to Australia?

Attribution generally

States 'act' through the conduct of people, 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.⁴

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

Attribution of conduct affecting asylum seekers and refugees offshore

The conduct of the Australian Home Affairs Minister, the Department of Home Affairs and Department officers,⁵ the Australian Parliament, the Australian Defence Force, the Australian Federal Police and any other government body will ordinarily 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 regional processing centre (RPC);
- 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 RPC;
- responses to requests for equipment, services and supplies for each RPC;
- responses to requests for medical evacuations to Australia;
- responses to requests to relocate victims of sexual assault away from their attackers within the RPCs;
- age determinations of asylum seekers claiming to be minors;
- responses to allegations of physical and sexual abuse and other human rights violations within each RPC;

- 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 people 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 people 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, to the extent that they ‘act on the instructions’ of the Australian government. Their contracts typically include instructions on how to perform their functions, and Department officers have previously issued instructions directly to private contractors in Nauru and PNG in the course of their work. At certain times, these companies and organisations may have also acted ‘under the direction or control’ of the Australian government. The conduct of certain companies may also have been attributable to Australia on the basis that they were exercising elements of governmental control in detaining asylum seekers and providing ‘garrison, operational and maintenance services’ at each RPC (while they were operating as detention centres).

Does conduct attributable to Australia breach its international legal obligations?

Conduct that is attributable to Australia will only engage Australia’s responsibility under international law if it violates an international legal obligation by which Australia is bound.

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.⁶

Since 2012, the offshore processing arrangements have been plagued by extensive and ongoing reports of significant violations of human rights.⁷ These reports indicate that any State with obligations to respect and protect the rights of people subject to these arrangements is likely to have breached those obligations. As discussed [below](#), more than one State may have obligations towards these individuals under international law at the same time, 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 people concerned are outside Australian territory. The following sections answer this question and explain why Australia is likely to have obligations both before and after the removal of people from Australian territory.

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 became relevant even before asylum seekers and refugees were transferred to Nauru and PNG. In particular, 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 he or she is removed, and will not subsequently be sent anywhere else where he or she 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;⁸
- 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;⁹ 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 he or she 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.¹⁰

In order to comply with these obligations, Australia should carefully consider the possible risks each asylum seeker might face in Nauru or PNG before transferring 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 (or may have violated) 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'¹¹ – they may amount to significant harm such that decisions by Australia to send asylum seekers offshore might 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.'¹²

If conditions offshore 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. Similarly, in Europe, there was previously a general presumption of this kind in relation to the return of asylum seekers to Greece.¹³ 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.¹⁴ 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.¹⁵

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'.¹⁶ 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 Nauru and on Manus Island in PNG are or were comparable to those in Greece, and would 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 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 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 reception conditions 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 offshore. For these groups, the cumulative effects of transfer 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.¹⁷ Absent these guarantees, no removal could take place. It is arguable that a similar prohibition on the removal of families with children could or should have been applied in relevant cases of transfer from Australia.

(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 the risk 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.¹⁸ The likelihood of such persecution should have been assessed in each individual case, with any asylum seeker found to be at risk exempted from removal offshore. Instead, however, there were reports that Australia's *non-refoulement* obligations may not have been applied properly in practice, especially in relation to asylum seekers with a fear of persecution in PNG.¹⁹

Obligations relevant to the treatment of people transferred to Nauru and PNG

Extraterritorial human rights obligations

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'.²⁰ 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.²¹

This broader understanding of jurisdiction has been affirmed by the UN Human Rights Committee,²² the UN Committee against Torture,²³ the International Court of Justice²⁴ and the European Court of Human Rights.²⁵ 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,²⁶ especially since treaty obligations must be interpreted and performed in good faith.²⁷

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'²⁸ over them, or over the territory in which they are located. According to the UN High Commissioner for Refugees (UNHCR):

It is generally recognised that a State has jurisdiction, and consequently is bound by international human rights and refugee law, if it has **effective de jure** [legal] **and/or de facto** [actual] **control over a territory 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 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).²⁹

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:

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.³⁰

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;³¹

- in the case of *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;³²
- 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;³³
- 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;³⁴
- 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;³⁵ 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.³⁶

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.³⁷ 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.

Does Australia have human rights obligations with respect to asylum seekers in Nauru and PNG?

A lack of transparency about the internal management of the RPCs on Nauru and Manus Island made it difficult to establish the exact nature of Australia's control over asylum seekers detained there. Nevertheless, the available evidence suggests that Australia did exercise effective control over these asylum seekers and had the power to affect their enjoyment of rights.³⁸ Relevantly:

- the only reason asylum seekers were in detention and at risk of human rights violations in Nauru or PNG was because Australia forcibly sent them there;
- certain decisions made by Australian authorities 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 exercised a considerable degree of control and enjoy substantial decision-making powers in relation to asylum seekers detained offshore, and therefore had a significant and direct impact on their enjoyment of rights; and
- Australian officers either conducted or closely supervised the refugee status determination processes in Nauru and PNG, at least in their earlier phases.³⁹

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,⁴⁰ at other times he and other representatives of the successive Australian governments have argued that the centres are wholly a matter for Nauru and PNG.⁴¹ 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.⁴² 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;⁴³ 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’.⁴⁴

UNHCR has also repeatedly stated that Australia has human rights obligations towards asylum seekers and refugees in Nauru and PNG.⁴⁵ 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.⁴⁶

Does Australia have human rights obligations with respect to refugees living in the community 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 were.

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.⁴⁷

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.⁴⁸

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). 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.

Related matters

Responsibility of multiple 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. Importantly, States cannot 'contract out' their international obligations to other States, or evade their obligations by getting other States to do what they could not do themselves.⁴⁹

Examples of situations in which two or more States may be responsible include where:

- they act through a body or entity set up under their joint command;
- they 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);
- they 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); or
- one State is implicated in the wrongful conduct of another State as a result of aiding, assisting, directing, controlling or coercing the other State in the commission of an internationally wrongful act.

Relevantly, these are separate and additional grounds for establishing a State's responsibility to those set out 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 necessarily preclude Australia from having parallel responsibility under international law.

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 parties. 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 human rights law treaties, six of which have the capacity to receive individual complaints.⁵⁰

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.⁵¹ However, Australia does not always do so.⁵²

Nevertheless, despite failures to alter government policy or practice in some previous cases, it remains possible that an individual or group of individuals affected by Australia's offshore processing arrangements 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.

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.⁵³

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Endnotes

¹ See the Kaldor Centre for International Refugee Law's Transfer Tracker <http://www.kaldorcentre.unsw.edu.au/publication/transfer-tracker>.

² Responsibility of States for Internationally Wrongful Acts (2001), arts 1, 2.

³ 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).

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

⁵ The Department of Home Affairs was formerly the Department of Immigration and Border Protection (September 2013 – December 2017) and the Department of Immigration and Citizenship before that (January 2007 – September 2013).

⁶ 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.

⁷ For an overview and analysis of these reports from 2012 to the beginning of 2016, see: Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth, 2016).

⁸ Refugee Convention, art 33(1).

⁹ CAT, art 3.

¹⁰ 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*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), <http://www.refworld.org/docid/478b26ae2.html> (General Comment no. 31), para 12.

¹¹ *MSS v Belgium and Greece*, European Court of Human Rights, Application no 30696/09, para 219.

¹² *Ibid.*

¹³ 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*.

¹⁴ *MSS v Belgium and Greece*.

¹⁵ *Ibid.*, para 233.

¹⁶ *Ibid.*, paras 366, 367.

¹⁷ *Tarakhel v. Switzerland*, European Court of Human Rights, Application no 29217/12, paras 116-122.

¹⁸ UNHCR, ‘UNHCR Monitoring Visit to Manus Island, Papua New Guinea: 23 to 25 October 2013’ (26 November 2013), , <http://www.refworld.org/docid/5294aa8b0.html> (UNHCR Monitoring Visit to Manus Island: October 2013), paras 123, 124; Amnesty International, *This is Breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (11 December 2013), http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf (*This is Breaking People*), ch 8.

¹⁹ 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—along with a pre-existing health condition. He said, ‘The staff were sympathetic but told me I was going [to Papua New Guinea] anyway’’: *This is Breaking People*, 74.

²⁰ 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 ICCPR 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: General Comment no. 31, 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.

²¹ *Saldaña v Argentina*, Inter-American Commission on Human Rights, Report No. 38/99, 11 March 1999, para 17.

²² The UN Human Rights Committee has affirmed 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’: General Comment no. 31, para 10 (emphasis added).

²³ 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*, UN Doc 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.

²⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, paras 109, 111, 113.

²⁵ See, for example, *Loizidou v Turkey*, European Court of Human Rights, Application no. 15318/89, para 52.

²⁶ 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, UN Doc CCPR/C/13/D/52/1979 (29 July 1981), para 12.3; *Lilian Celiberti de Casariego v. Uruguay*, UN Human Rights Committee, UN Doc 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*, European Court of Human Rights, Application no. 31821/96, para 71.

²⁷ Vienna Convention on the Law of Treaties, arts 26, 31.

²⁸ 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.

²⁹ UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims*, paras 10, 11 (emphasis in original).

³⁰ UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers*, May 2013, <http://www.refworld.org/pdfid/51af82794.pdf>, para 4.

³¹ 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.

³² *Medvedyev & Ors v. France* [GC], no. 3394/03, ECHR 2010.

³³ UN Committee against Torture, *JHA v Spain*, CAT/C/41/D/323/2007, 21 November 2008, para. 8.2.

³⁴ UN Human Rights Committee, *Sergio Euben Lopez Burgos v. Uruguay*, CCPR/C/13/D/52/1979, 29 July 1981; UN Human Rights Committee, *Lilian Celiberti de Casariego v. Uruguay*, CCPR/C/13/D/56/1979, 29 July 1981.

³⁵ *Hirsi Jamaa & Ors v Italy* [GC], no. 27765/09, §76-82, ECHR 2012.

³⁶ *Djamel Ameziane v. United States of America*, Petition P-900-08, Report No. 17/12, Judgment on Admissibility, Inter-Am. C.H.R., March 20, 2012.

³⁷ 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 Gleeson (@madelinegleeson) 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.

³⁸ 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.

³⁹ See, for example, Senate Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, December 2014, http://www.aph.gov.au/~media/Committees/Senate/committee/legcon_ctte/Manus_Island/Report/report.pdf (*Inquiry into Manus Island Incident*), Chapter 4; UNHCR, *UNHCR Mission to the Republic of Nauru: 3-5 December 2012*, 14 December 2012, <http://www.refworld.org/docid/50cb24912.html> (*Visit to Nauru - December 2012*), p. 1 and paras. 43-44, 48; UNHCR, *UNHCR Monitoring Visit to the Republic of Nauru - 7 to 9 October 2013*, 26 November 2013, <http://www.refworld.org/docid/5294a6534.html> (*Visit to Nauru - October 2013*), paras. 29-32.

⁴⁰ 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.

Scott Morrison MP, 'Manus Island incident, Operation Sovereign Borders joint review', Press Conference, 21 February 2014, Sydney (transcript available at: <http://sievx.com/articles/OSB/ManusIsland/20140221ScottMorrison.html>).

⁴¹ 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.

⁴² 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>.

⁴³ *Ibid.* See, for example, <https://twitter.com/madelinegleeson/status/531741603409313792>.

⁴⁴ UN Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5, 23 December 2014, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/249/01/PDF/G1424901.pdf?OpenElement>, para. 17.

⁴⁵ UNHCR, *Visit to Nauru – December 2012*, p. 1 and paras. 15-16, 31; UNHCR, *Visit to Nauru – October 2013*, paras. 92-93, 128; UNHCR, *UNHCR Mission to Manus Island, Papua New Guinea: 15-17 January 2013*, 4 February 2013, <http://www.refworld.org/docid/5139ab872.html> (*Visit to Manus Island – January 2013*), para. 22; UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea: 11-13 June 2013*, 12 July 2013, <http://www.refworld.org/docid/51f61ed54.html>, para. 10; UNHCR, *Visit to Manus Island – October 2013*, para. 16.

⁴⁶ Senate Legal and Constitutional Affairs References Committee, *Inquiry into Manus Island Incident*, para. 8.33.

⁴⁷ UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims*, para. 54.

⁴⁸ *Visit to Manus Island: October 2013*, p 3.

⁴⁹ See, for example: *Hirsi Jamaa & Ors v Italy*, European Court of Human Rights, Application no 27765/09, para 129.

⁵⁰ 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>.

⁵¹ UN Human Rights Committee, *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/GC/33 (5 November 2008), <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.pdf>, paras 11-15.

⁵² See, for example: *FKAG v Australia*, UN Human Rights Committee, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (28 October 2013); *MMM v Australia*, UN Human Rights Committee, Communication No. 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (28 October 2013).

⁵³ See, for example: 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.