

# **“For those who’ve come across the seas”**

*Australia’s obligations under international human rights and  
refugee law to asylum seekers processed offshore in Nauru and  
Papua New Guinea*

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## **ABBREVIATIONS**

CAT	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment
CRC	Convention on the Rights of the Child
ECHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
NGO	Non-governmental organisation
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ISIS	Islamic State in Iraq and Syria
MOU	Memorandum of Understanding
OSB	Operation Sovereign Borders
RPC	Regional Processing Centre
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee

## Introduction

*“We will determine who comes to this country and the circumstances in which they come.”*

John Howard, 2001, then Prime Minister of Australia <sup>1</sup>

Australia is fundamentally a nation of boat people, arriving, unannounced on unfamiliar shores.<sup>2</sup> Australia’s social history is migratory; apart from Australia’s Aboriginal population, every person who is “Australian” was at one point in their ancestral past a migrant - even a refugee. Even a verse in Australia’s national anthem begins “for those who’ve come across the seas; we’ve boundless plains to share”.<sup>3</sup> Nevertheless, in July 2013, Australia closed its borders to irregular migrants by asserting that no asylum seeker who arrived by boat would ever be resettled in Australia.<sup>4</sup> Instead, they would be sent to processing centres on either Manus Island in Papua New Guinea, or on the Republic of Nauru (hereafter referred to as Nauru). The Australian bounty of those “boundless plains” of yesteryear are open no longer to asylum seekers who have come across the ocean.

Australia is one of many Western nations grappling with the flow on effects of the “refugee crisis” which has dominated the news since mid 2015. As a result of increasing global violence, including the Syrian Civil War and the rise of the Islamic State (ISIS), the United Nations High Commissioner for Refugees (UNHCR) has announced that 2015/2016 saw record numbers of displaced persons; higher even than those experienced during World War II.<sup>5</sup> The UNHCR estimates that as of 2016 there are 65.3 million displaced persons globally, with 21.3 million of these being in refugee like situations.<sup>6</sup> An international pattern is emerging in which global governments

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<sup>1</sup> John Howard, Prime Minister of Australia, “Transcript of the Prime Minister the Hon John Howard MP Address at the Federal Liberal Party Launch Sydney” (Federal Liberal Party Campaign Launch, Sydney, Australia, 28 October 2001).

<sup>2</sup> Ben Doherty “Call Me Illegal: The semantic struggle over seeking asylum in Australia” (University of Oxford, Reuters Institute for the Study of Journalism, 2015) at 16.

<sup>3</sup> Peter Dodds McCormick “Advance Australia Fair” Australian National Anthem (1878).

<sup>4</sup> This is a policy that has continued; most recently on the 21 September 2016 Peter Dutton, Minister of Immigration held: “So let me be clear. Anyone who attempts to come to Australia by boat will never be settled here permanently. No one on Manus Island or Nauru will ever be settled in Australia.” Peter Dutton “Address to the Australian Strategic Policy Institute, Canberra” (Australian Strategic Policy Institute, Canberra, 15 September 2016).

<sup>5</sup> Adrian Edwards “Global forced displacement hits record high” (20 June 2016) UNHCR <[www.unhcr.org](http://www.unhcr.org)>.

<sup>6</sup> In comparison, in 2010 there were only 43.7 million displaced people in the world. The change in these figures have led to what many have termed “the refugee crisis” and has led governments to reconsider their policies towards refugees that come by unconventional means. Currently, 65.3 million displaced persons works out to be around one displaced person in every 113. Only 23 million of these people will become refugees, and only 1% of them will be offered permanent resettlement in a country of first asylum. See for 2016 figures Adrian Edwards “Global forced displacement hits record high”

appear to be committed to implementing defensive strategies, designed to avoid international responsibility for involuntary migrants.

Yet, Australia's hard-line policies on the arrival of asylum seekers at its sea borders pre-date the recent "refugee crisis". Partially in response to public pressure, Australia has since the early 2000s has developed a three-pronged approach to the deterrence of asylum seekers – militarised at-sea boat turn-backs; the excision of portions of territory from its migration zone; and, most controversially, at various points over the past sixteen years, the sending of asylum seekers who arrive by boat in Australian territory to third party states, which process and house the asylum seekers in Australian government funded "regional processing centres" (RPCs). This paper will focus on the impact that offshore processing has on international human rights and refugee law, using Australia's policy as a case study.

This strategy of the Australian government is currently in a state of flux. The RPCs have been hotbeds for controversy since they were reopened in 2012. On 12 of August 2016, *The Guardian* published a series of documents called the Nauru Files.<sup>7</sup> The Nauru Files are a publication of more than 2,000 leaked incident reports from the Nauru RPC.<sup>8</sup> The Nauru Files document the systematic abuse, both physical and sexual, experienced by the asylum seekers, and detail the daily self-harm and despair that those mired on the islands have displayed during their detention.<sup>9</sup> Further, on 17 August 2016, Peter Dutton, the Australian Minister of Immigration, in conjunction with the Papua New Guinea government announced that the offshore processing facility on Manus Island would be closed. The publication of the Nauru Files has reignited the furore around the treatment of asylum seekers in Nauru and Papua New Guinea, and brought the policies and practices of offshore detention back to the centre of the Australian, and global, public debate on asylum seeking.

The controversy lies within what occurs in these processing centres, and how Australia may retain responsibilities for asylum seekers housed offshore. Successive Australian governments have put in place legislation which aims to be preventative of domestic legal challenges to its offshore processing policies. This paper will consider the international human rights and refugee obligations that Australia retains towards asylum seekers sent to Nauru and Manus Island. This provokes questions in the

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(20 June 2016) UNHCR <[www.unhcr.org](http://www.unhcr.org)>. For 2010 figures, see UNHCR *Global Trends 2010* (2011).

<sup>7</sup> Editorial "The Nauru Files" *The Guardian* (online ed, Canberra, 16 August 2016).

<sup>8</sup> Ben Doherty, "After the Nauru files, how can Australia go about ending offshore detention?" *The Guardian* (online ed, Sydney, 15 August 2016).

<sup>9</sup> Ben Doherty, "After the Nauru files, how can Australia go about ending offshore detention?", above n 8.

developing area of the extraterritorialisation of international human rights law, and how this has interplay with international refugee law. It is acknowledged that this topic is immense, and as such this paper is limited in scope and will not attempt to provide the solution to the problems that Australia is currently experiencing; instead it will focus on how the current framework of international human rights and refugee law might work to hold Australia accountable.

Part I provides context for the policy of offshore processing. Using Australia's history of offshore processing, it illuminates how Australia's determination to not be responsible for asylum seekers that have come to Australian territory by boat have led to a succession of policies and legislative changes that move the responsibility of these asylum seekers offshore.

Part II focusses on international human rights and refugee law abuses that may be attributed to Australia. Australia owes obligations to asylum seekers held offshore before they are sent there if they are first taken to Christmas Island. Additionally, Australia may retain responsibility for asylum seekers once they are held in the Nauru and Papua New Guinea RPCs. This will depend on whether or not Australia's international human rights and refugee obligations can extend extraterritorially.

Part III will briefly consider the various mechanisms through which, if found to have breached various international human rights treaties, Australia may be held accountable. It will ultimately conclude that it is unlikely that the international community will condemn Australia for its militarised approach to processing asylum seekers, especially as many of the world's powers move to do the same.

Part IV will place the Australian debate on offshore processing and human rights abuses of the asylum seeker in a global context. It will consider how the extraterritorialisation of migration controls is leading to human rights abuses, where the right to seek asylum from persecution is being superseded by the concept of "illegality". It will consider the effects that globalisation and national security are having on changing the nature of international borders in the post 9/11 world.

Ultimately this paper will conclude that if offshore processing is here to stay as a tool in the state's arsenal to manage the movement of people and control immigration, there needs to be a fundamental change in the international asylum seeker process to ensure that the human rights of some of society's most vulnerable people are protected.

# I A Race to the Bottom: Australia and the Offshore Processing of Asylum Seekers

*"I didn't need to be told about offshore processing because the Coalition invented offshore processing,"*

Tony Abbot, 2012, Leader of the Opposition <sup>10</sup>

## A *Closing the Sea Border: A brief history of Australia's offshore processing policy*

Australia has a political history littered with controversial policies aimed at discouraging asylum seekers rather than protecting those who engage in it.<sup>11</sup> At its core is a policy of deterrence, so much so that Australia has been called “the global leader in the refugee law race to the bottom”.<sup>12</sup> From 2001 to 2008 Australia funded and ran what became known as the “Pacific Solution”, in which the care and processing of asylum seekers was outsourced to neighbouring Pacific nations, specifically Nauru and Papua New Guinea.<sup>13</sup> The camps that were established in Nauru and on Manus Island in Papua New Guinea housed asylum seekers for the period of time it took for their claims for refuge to be processed by Australia. From there they were resettled if they were found to have a legitimate refugee claim. Over 70 percent of the 1637 people processed during this time were eventually resettled in Australia.<sup>14</sup>

The Pacific Solution was founded in reaction to the 2001 *Tampa* affair. In 2001 a Norwegian tanker, the *MV Tampa*, rescued a fishing boat containing more than 400 Hazara Afghan asylum seekers that had come ashore off the coast of Indonesia en route to Christmas Island.<sup>15</sup> A period of stand-off ensued. The Australian government did not want to receive the asylum seekers, ostensibly in the knowledge that if it did, the asylum seekers would have to be processed and protected under the Refugee Convention in Australia. Eventually, government officials arranged for the migrants to be processed on Nauru, and then resettled in either Nauru or New Zealand.<sup>16</sup> The

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<sup>10</sup> This is a direct quote from Tony Abbot, then leader of the Opposition, in response to questions about the “Malaysian Swap” deal. See AAP “We invented offshore processing: Abbot” *AAP General News Wire* (online ed, Sydney, 08 September 2011).

<sup>11</sup> See Appendix 2 for a timeline of Australia’s policy of offshore processing.

<sup>12</sup> Catherine Dauvergne *Making People Illegal: What Globalization Means for Migration and Law* (New York, Cambridge University Press, 2008) at 51.

<sup>13</sup> See Appendix 1 for a map of Manus Island, Nauru and Australia in relation to each other.

<sup>14</sup> Refugee Council of Australia *Report on Australia's Offshore Processing Regime* (2016) at 1. Other asylum seekers went on to be resettled in New Zealand, Sweden, Canada, Denmark and Norway, while a further 483 asylum seekers left voluntarily, usually to return to their home states once their application was denied.

<sup>15</sup> Peter D. Fox “International Asylum and Boat People: The Tampa Affair and Australia’s “Pacific Solution”” 25 *Md J Intl L* 355 at 365.

<sup>16</sup> Martin Flynn and Rebecca LaForgia “Australia’s Pacific Solution to Asylum Seekers” (2002) *LawAsia J* 31 at 33.

Howard Government set out to legitimise its actions towards the *Tampa* refugees through legislation.<sup>17</sup> So was born the original Pacific Solution, which was to run for seven highly controversial years. At its conclusion in February 2008, the original processing centres on Nauru and Manus Island were both closed. The newly elected Labor Government sponsored the closure of the centres, labelling the Pacific Solution a “cynical, costly and ultimately unsuccessful exercise”, as by and large the asylum seekers were determined to be refugees, and resettled in the Australian community.<sup>18</sup> At the closure of the Manus Island RPC, Papua New Guinea’s Foreign Affairs and Trade Minister Sam Abal told the Associated Press that “that part of history is over... it’s an Australian issue which we assisted with, to process those people that Australia wanted to process.”<sup>19</sup>

Yet Australia continued to search for ways to deal with the “boat people”. In 2011, the Gillard Government devised a plan to “swap” asylum seekers who had arrived by boat in Australia with pre-processed refugees from Malaysian refugee camps. In similar fashion, what was termed the “Malaysian Solution” involved sending 800 irregular migrants to Malaysia in return for 4,000 pre-processed refugees.<sup>20</sup> The UNHCR begrudgingly agreed to oversee the “swap” process, as they had in a similar observatory role during the original Pacific Solution. However, the High Court of Australia intervened, ruling that the policy itself was unlawful.<sup>21</sup> The failure of the Malaysian Solution was an embarrassment to the Gillard Government, and goes some way towards explaining the events of 2012.

In 2012, in what was seen by many as a knee-jerk response by the governing party to a sharp increase in the number of boat arrivals, the Labor Government developed an interest in further detention measures.<sup>22</sup> Perhaps not wanting to be seen as being “soft” on a hot issue in the year before a general election, the Labor Government announced the reprisal of the transfer of asylum seekers to Nauru and Papua New Guinea in August 2012.<sup>23</sup> Australia signed two separate Memoranda of Understanding (MOU) with

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<sup>17</sup> Anthony Pastore “Why Judges Should Not Make Refugee Law: Australia’s Malaysia Solution and the Refugee Convention” (2012) 13 CJIL 615 at 620.

<sup>18</sup> Chris Evans, Minister for Immigration and Citizenship “Last Refugees Leave Nauru” (press release, 8 February 2008).

<sup>19</sup> AAP “Aussie’s Pacific Solution comes to an end” *Stuff.co.nz* (online ed, Auckland, 07 February 2008).

<sup>20</sup> Sasha Lowes “The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of Australia in the ‘Malaysian Solution’ Case” (2012) 12(1) HRLR 168 at 173.

<sup>21</sup> Sasha Lowes “The Legality of Extraterritorial Processing of Asylum Claims”, above n 20 at 173.

<sup>22</sup> Elibritt Karlsen “Australia’s offshore processing of asylum seekers in Nauru and PNG: A Quick Guide to statistics and resources” Parliamentary Research Papers (30 June 2016) at 1.

<sup>23</sup> Azadeh Dastyari “Detention of Australia’s Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful” (2015) 38 UNSWLJ 669 at 670. The Labor Government lost the election later that year to be replaced by the Coalition, led by Tony Abbott. Many saw that one aspect to Gillard’s loss was the perception that she was “soft on asylum seeker issues”. For analysis, see

Nauru and Papua New Guinea in August and September of 2012, respectively.<sup>24</sup> Asylum seekers who arrived by boat, usually on Christmas Island or other outlying Australian islands, would be taken to Manus Island in Papua New Guinea if they were a single male, or to Nauru if they were a family with children, a single female or an unaccompanied minor.<sup>25</sup> If they were found to be refugees, like in the original Pacific Solution, they had a chance of being resettled in Australia.

Four years after the closure and admitted failure of the Pacific Solution, the new Australian government looked set to make the same mistakes. Yet they went much further: in July 2013, a few months before the impending federal election, the Labor Government, under the leadership of Kevin Rudd, took the unprecedented approach of announcing that no asylum seeker who arrived by boat after 19 July 2013 would ever be processed or resettled in Australia.<sup>26</sup> Australia signed follow up MOUs with Papua New Guinea and Nauru in July and August 2013, respectively. The memoranda set out that each transferee's protection claims would be assessed by Nauru and Papua New Guinea, and that those who were found to be in need of international protection would be settled either in Papua New Guinea and Nauru, or in a further third state.<sup>27</sup> Australia bore the full costs of the arrangements in both countries.<sup>28</sup> The only other country that has offered resettlement thus far has been Cambodia, in a highly controversial deal that has only seen a handful of refugees from the RPCs resettled at an enormous financial cost to the Australian public.<sup>29</sup> Australia is currently exploring further resettlement arrangements with other countries, including Kyrgyzstan.<sup>30</sup>

The much harsher policy had cross-party support in the Australian parliament, with the opposition Coalition supporting the move. Tony Abbot stated that if he were to head

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Rebecca Hamlin *Let Me Be a Refugee: Administrative justice and the politics of asylum in the United States, Canada and Australia* (Oxford, Oxford University Press, 2013) at 58.

<sup>24</sup> Azadeh Dastyari, above n 23 at 670.

<sup>25</sup> Some single men would be taken to Nauru as well. See Elibritt Karlsen "Australia's offshore processing of asylum seekers in Nauru and PNG", above n 22, at 4.

<sup>26</sup> Claire Henderson "Australia's Treatment of Asylum Seekers: From Human Rights Violations to Crimes Against Humanity" (2014) 12 JICJ 1161 at 1164.

<sup>27</sup> Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru and Related Issues, Nauru – Australia, (29 August 2012) at 4, and Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues, Papua New Guinea – Australia (6 August 2013) at 3-4.

<sup>28</sup> Memorandum of Understanding between Nauru and Australia, above n 26, at 3 and Memorandum of Understanding between Papua New Guinea and Australia, above n 27, at 3.

<sup>29</sup> Only five refugees have been resettled in Cambodia, and the majority of them have left to return to their home states. See: Liam Cochrane "Refugee resettlement program in Cambodia an 'expensive joke' as Iranian couple return home" *ABC News* (online ed, South East Asia, 9 March 2016).

<sup>30</sup> Patrick Van Berlo "The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality" (2016) 16 *H R L Rev* 1 at 3.

the government after the election, he would “be prepared to rapidly ramp up the capacity of Nauru to 2000 [asylum seekers] and beyond.”<sup>31</sup> When Abbott was elected in 2013, his Coalition instigated Operation Sovereign Borders (OSB). OSB is a military led response unit aimed at preventing and intercepting irregular migrants from arriving in Australian territory.<sup>32</sup> OSB proved successful, managing to either intercept and turn around, or divert, any boat headed for Australian territory, leading Abbott to purport to have “stopped the boats” in 2014.<sup>33</sup> A series of advertisements and campaigns coined the phrase “NO WAY – you will not make Australia home”.<sup>34</sup> While the policy of sending asylum seekers who arrive by boat remains active, due to OSB and declining boat arrivals, no new irregular migrant has been sent to the RPCs since December 2014.<sup>35</sup>

Around 2,000 asylum seekers remain on the RPCs as of September 2016. Between 2013 and 2016, the RPCs in Nauru and Papua New Guinea have been embroiled in controversy. In reaction to the news that no asylum seeker would be resettled in Australia, riots rocked the Nauru RPC on the 19 July 2013, causing 60 million dollars in damage to the facility.<sup>36</sup> In a similar vein, rioting broke out in the Manus Island RPC between 16 and 18 February 2014, which resulted in the death of Iranian asylum seeker Reza Barati.<sup>37</sup> The riot on Manus Island was reported to be as a result of “anger and frustration” at the resettlement plan.<sup>38</sup> On 28 April 2016, in an incident that was filmed, 23-year-old Iranian asylum seeker Omid Masoumali self-immolated. Before he set himself alight he stated that “this is how tired we are, this action will prove how exhausted we are. I cannot take it anymore.”<sup>39</sup> Masoumali died as a result of his actions. Later that week, 19-year-old Somali refugee Hodan Yasin also set herself alight on Nauru. She did not die of her wounds, but severe burns covered 70 percent of her body.<sup>40</sup> The Nauru Files further document an epidemic of self-harm and abuse that those in detention in Nauru have displayed since 2013.<sup>41</sup>

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<sup>31</sup> ABC News “Asylum seekers registered with UNHCR in Indonesia after June no longer eligible for resettlement in Australia, Scott Morrison says” *ABC News* (online ed, Melbourne 18 November 2014).

<sup>32</sup> Azadeh Dastyari, above n 23, at 671.

<sup>33</sup> Claire Henderson, above n 26, at 1165.

<sup>34</sup> “Counter People Smuggling Communication” (accessed September 2016) Australian Government Department of Immigration and Border Control <[www.border.gov.au](http://www.border.gov.au)>.

<sup>35</sup> Elibritt Karlsen, above n 22, at 8.

<sup>36</sup> Latika Bourke “Manus Island riot: Independent report by Robert Cornall details deadly detention centre violence” *ABC News* (online ed, Sydney, 27 May 2014).

<sup>37</sup> Latika Bourke “Manus Island riot”, above n 36.

<sup>38</sup> Latika Bourke “Manus Island riot”, above n 36.

<sup>39</sup> Ben Doherty and Helen Davidson “Self-immolation: desperate protests against Australia’s detention regime” *The Guardian* (online ed, Sydney, 3 May 2016).

<sup>40</sup> Ben Doherty and Helen Davidson “Self-immolation”, above n 39.

<sup>41</sup> Editorial “The Nauru Files”, above n 7. On one report is the transcription of a women saying that “if I am made to have my baby on Nauru I will have my baby in my tent and will kill myself and my baby.”

In April 2016, the Papua New Guinea Supreme Court held that the forced transfer and detention of asylum seekers in the processing centre on Manus Island was unconstitutional.<sup>42</sup> The Papua New Guinea Supreme Court ordered both Papua New Guinea and Australia to “take all steps necessary to cease and prevent the continued unconstitutional and illegal detention”.<sup>43</sup> In an effort to bring the RPC in line with constitutional requirements, changes were made to the detention centre so that the men could move in and out of its grounds.<sup>44</sup> In spite of the changes, the Papua New Guinea government announced in August 2016 that the Manus Island RPC would be closed, with Dutton confirming that while the centre would shut, none of the men held on Manus Island would be resettled in Australia.<sup>45</sup> As of 31 March 2016, there were 877 men still in the Manus Island RPC, and more than 468 people in the Nauru RPC, with a further 500 now living in the Nauru community on temporary refugee visas.<sup>46</sup> It has been suggested by Dutton that those men held on Manus Island may be moved to Nauru until a more permanent solution can be found, or that they will simply be released in to the Papua New Guinea community.<sup>47</sup> At this point in time, it remains highly unlikely that any of the asylum seekers held in the Nauru or Manus Island RPC will ever eventually be resettled in Australia.<sup>48</sup>

### *B Drawing Lines in the Sand: The domestic policy behind offshore processing*

The controversial boat arrivals represent only a small proportion of Australia’s total refugee intake. The majority of Australia’s refugee “quota” are resettled through the UNHCR’s offshore humanitarian programme. In 2014 and 2015, 13,758 visas were granted under this programme.<sup>49</sup> As of 2015, Australia was protecting 0.48 percent of

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<sup>42</sup> *Namah v Pato & others* SC 1497 (SCA. No 84 of 2013) delivered 26 April 2016 at [72].

<sup>43</sup> *Namah v Pato & others*, above n 42, at [31].

<sup>44</sup> See: Anna Henderson and Stephanie Anderson “Nauru to process all asylum seekers in offshore detention centre with the next week; refugees among those to assess application” *ABC News* (online ed, Canberra, 05 October 2015); also see *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1 at [19] “shortly prior to the hearing of this matter, the Government of Nauru published a notice in its Gazette to the effect that it intended to expand open centre arrangements to allow for freedom of movement of asylum seekers 24 hours a day, seven days per week and that the arrangements were to be made the subject of legislation at the next sitting of the Parliament of Nauru”.

<sup>45</sup> Peter Dutton “Address to the Australian Strategic Policy Institute, Canberra” (Australian Strategic Policy Institute, Canberra, 15 September 2016).

<sup>46</sup> Helen Davidson “Nauru files: how you can help people held in detention by Australia” *The Guardian* (online ed, Darwin, 12 August 2016) and Refugee Council of Australia, above n 14.

<sup>47</sup> Nauru RPC has the capacity to hold a much higher amount of refugees – at its peak, the centre housed over 1,000 asylum seekers. Now, most of these asylum seekers are either housed in the community on temporary refugee visas, while many others have elected to return to their home states. See Elibritt Karlsen, above n 22, at 4.

<sup>48</sup> For political analysis on why, see: Ben Doherty, “After the Nauru files, how can Australia go about ending offshore detention?” *The Guardian* (online ed, Sydney, 15 August 2016).

<sup>49</sup> Australian Government Department of Immigration and Border Protection *Department of Immigration and Border Protection: Annual Report 2014-2015* (September 2015).

global refugees.<sup>50</sup> Australia has one of the world's most extreme deterrence policies towards irregular migrants. It is prejudicial; asylum seekers who arrive via plane are not sent offshore, offshore processing is reserved as a deterrence only for those who arrive by boat.

Guy S. Goodwin-Gill describes offshore processing as where:<sup>51</sup>

one state use's another territory, with or without the assistance of an international organisation, in order to decide claims to asylum which either have already been lodged in its own territory, or might have been lodged there if the claimant had not been intercepted en route.

Australia's practice of offshore processing is intended to disincentivise those asylum seekers who seek to gain access to Australian migration pathways from arriving by boat.<sup>52</sup> In 2012, the Gillard Government commissioned a report on the "boat people problem". The result was the Report of the Expert Panel on Asylum Seekers, which outlined why offshore processing was a necessary policy.<sup>53</sup> The Expert Panel found that offshore processing could be implemented as a method of delaying the processing times of asylum seekers who arrived by boat in order to mirror the delays in processing for those who waited in UNHCR run camps overseas.<sup>54</sup> This was called the "no advantage principle", under which irregular migrants who arrive in Australia by boat are not advantaged over those who seek asylum through enhanced regional and international arrangements and through regular Australian government sponsored pathways.<sup>55</sup> Further, the Report found that prolonged detention in RPCs was necessary to make travelling by boat undesirable to the point that it undercut the trade of people smugglers.<sup>56</sup> This was the main humanitarian thrust of the Report; people smugglers operate as criminal gangs at a very high financial and humanitarian cost to asylum seekers. Asylum seekers pay huge sums for passage on substandard boats and will often pay with their lives if the boat sinks. This was ostensibly what the Report was trying to prevent.<sup>57</sup>

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<sup>50</sup> The country currently hosting the most refugees is Turkey, with 2.7 million refugees. Turkey is the most common destination for asylum seekers fleeing violence in the Middle East hoping to reach better protection schemes in the EU. See: UNHCR "Global Focus: Turkey" (2016) <[www.unhcr.org](http://www.unhcr.org)>

<sup>51</sup> Guy S. Goodwin-Gill "The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Obligations" (2007) 9 UTS L Rev 26 at 26.

<sup>52</sup> Australian Government *Report of the Expert Panel on Asylum Seekers* (August 2012) at 8.

<sup>53</sup> Australian Government *Report of the Expert Panel on Asylum Seekers*, above n 52 at 10 [iii].

<sup>54</sup> Australian Government *Report of the Expert Panel on Asylum Seekers*, above n 52 at 26. For a contrasting view on this point see: Jane McAdam and Fiona Chong *Refugees: Why Seeking Asylum is Legal and Australia's Policies Are Not* (Sydney, UNSW Press, 2014) at ch 2.

<sup>55</sup> Australian Government *Report of the Expert Panel on Asylum Seekers*, above n 52 at 4.41.

<sup>56</sup> Australian Government *Report of the Expert Panel on Asylum Seekers*, above n 52 at 3.56.

<sup>57</sup> There are an estimated 807 deaths of people attempting to reach Christmas Island. See: Australian Border Deaths Database, *Border Crossing Observatory*, MONASH (Last updated 02 August 2016).

Australia's policy towards asylum seekers has moved through different phases since it was first formulated in 1977,<sup>58</sup> as a response to boatloads of Vietnamese arriving due to the Vietnam War.<sup>59</sup> Since the 1990s, the Migration Act 1958 (Migration Act) has distinguished between lawful non-citizens who hold valid visas, and unlawful non-citizens.<sup>60</sup> Section 198 of the Act holds that an immigration officer can remove an unlawful non-citizen from Australian territory as "soon as reasonably practicable".<sup>61</sup> In 2012, following the failure of the "Malaysian Solution", the Migration Act was amended. Section 198AA was inserted, setting out five reasons for the new sections.<sup>62</sup> These included the desire to address people smuggling and the loss of life at sea and to allow the Minister to decide which countries could be those in which offshore assessments can take place.<sup>63</sup> Many commentators have suggested that the new sections were carefully worded to resist any domestic legal challenge. Further to this, in December 2014 the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 was passed. Under the Bill most references to the Refugee Convention were removed as a part of a span of amendments to a range of legislation, and the powers of the Minister for Immigration to detain and transfer people intercepted at sea were extended.<sup>64</sup>

In October 2015, in response to a legal challenge by a Bangladeshi asylum seeker to her detention in Nauru, the Australia government passed further legislation retrospectively legitimising the Commonwealth's involvement in the transfer of asylum seekers to Nauru.<sup>65</sup> The provisions were enacted in s 198AHA of the Migration Act. The section was given retrospective effect from 18 August 2012, when the Australian government began sending the asylum seekers to Nauru. The insertion of s 198AHA led a majority in the High Court of Australia to rule in February 2016 that the

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<sup>58</sup> Claire Henderson, above n 26, 1163.

<sup>59</sup> Malcolm Fraser has described taking refugees during this time period as the "right thing to do" and during his time in government "offered sanctuary" to the government's "full resources" successfully establishing the asylum seekers within the community. See: Louise Chappell, John Chesterman, Lisa Hill *Politics of Human Rights in Australia* (Cambridge University Press, 2009) at 198, and Ben Doherty "Call me illegal: The semantic struggle over seeking asylum in Australia" (University of Oxford, Reuters Institute for the Study of Journalism, 2015) at 7.

<sup>60</sup> Migration Act 1958 (Cth), ss 13-14.

<sup>61</sup> Migration Act 1958 (Cth), s 198.

<sup>62</sup> Lisa Jane Archibold "Offshore Processing of Asylum Seekers – is Australia complying with its international legal obligations?" (2015) 15 QUT L Rev 137 at 144.

<sup>63</sup> Migration Act 1958 (Cth), s 198AA.

<sup>64</sup> Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

<sup>65</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1 at [15].

Commonwealth's involvement in the detention of the Bangladeshi asylum seeker in Nauru was authorised by valid Australia statute.<sup>66</sup>

The history of offshore processing, as well as the legislation, policy and politics behind it, provide context for the international debate that surrounds the extraterritorialisation of human rights and refugee obligations. The steps that Australia has taken domestically to mitigate responsibility make international law one of the only mechanisms through which responsibility to Australia can be assigned. This background becomes crucial when we consider the entrenchment of this policy in Australian politics, and the real life effects it is having on the asylum seekers held offshore.

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<sup>66</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, above n 65, at Order Question 2(b).

## II Australia's Breaches of International Human Rights and Refugee Law

*"We must enforce our national right to determine who comes here to live, and when and how they do so. Let us hear no more of this nonsense that we live in a borderless world or that we owe a greater obligation than the people of other countries to those who would prefer to bend the rules and come to our shores illegally."*<sup>67</sup>

Phil Ruddock, Australian Immigration Minister, 2001 – 2007

As a matter of international law, Australia cannot avoid its international responsibilities towards asylum seekers by simply outsourcing its obligations.<sup>68</sup> There is a general understanding that international human rights law "parallels and supplements national law", in that it stands alongside established domestic legislation to protect citizen rights.<sup>69</sup> However, in Australia, it seems that there is a governmental trend to ignore established international human rights and refugee obligations towards the asylum seeker in favour of domestic policy. The Australian government has tried to avoid its responsibility towards those who have arrived in their territory by delegating the responsibility of their processing and resettlement to another state. The implications of these arrangements run counter to the human right responsibilities Australia has willingly assumed as a party to various international human rights instruments and the Refugee Convention.

The focus in this paper on Australia's international legal responsibilities under its offshore arrangements is not to suggest that Nauru and Papua New Guinea do not have humanitarian responsibilities under international law towards the asylum seekers held in their respective RPCs. It is instead to acknowledge that Australia, as the dominant state in the tripartite relationship, has instigated and implemented the regional policy and provided financial incentives for Nauru and Papua New Guinea's participation in the scheme.<sup>70</sup> The question of whether Australia can still be held accountable for the breaches of human rights obligations towards asylum seekers still held offshore is especially important considering the role Australia is currently playing in the

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<sup>67</sup> Phil Ruddock "Speech delivered in the Australian Parliament" (Senate Debate, Canberra, June 16, 2003).

<sup>68</sup> Madeleine Gleeson "Factsheet: Offshore Processing – Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea" (8 April 2015) Kaldor Centre for Refugee Law <[www.kaldorcentre.unsw.edu.au](http://www.kaldorcentre.unsw.edu.au)> at 2.

<sup>69</sup> Angus Francis "Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing" (2008) 20 Intl J Refugee L 273 at 276.

<sup>70</sup> Australia has allegedly turned a blind eye to other internal Papua New Guinea humanitarian crises in an effort to keep the detention centre open. See: Amnesty International "By Hook or By Crook – Australia's Abuse of Asylum Seekers at Sea" (August 2015), and Jeff Sparrow "In PNG and Nauru, Australia's immigration policy comes at the expense of democracy" The Guardian (15 June 2016) <[www.theguardian.com](http://www.theguardian.com)>.

impending closure of the Manus Island RPC.<sup>71</sup> While shutting Manus Island might appear to be one step towards a fair solution, it is far from a settled resolution for the asylum seekers, especially if the men are transferred to the Nauru RPC as Dutton has proposed, or simply released into the Papua New Guinea community.<sup>72</sup>

The bare bones of the arrangement between the three nations is this: before the asylum seekers are sent to either the Nauru or Manus Island RPC, they are first sent to Christmas Island.<sup>73</sup> On Christmas Island, at the detention centre that is the frontier of Australian immigration, they receive cursory health and identity screening.<sup>74</sup> The asylum seekers are then sent on to Papua New Guinea and Nauru for “processing”. Processing entails ascertaining whether the asylum seeker meets the definition of a refugee under the Refugee Convention.<sup>75</sup> The end goal for Australia is that those who are found to be refugees will be resettled permanently in another country. In accordance with this, if the asylum seeker landed by boat in Australia after 19 June 2013, he or she will never be considered for resettlement in the Australian community.<sup>76</sup>

For the over 2,000 asylum seekers sent offshore in this manner, there are two alternate points at which Australia may have differing sets of responsibilities towards them. These are:

- 1) when Australia sends the asylum seekers from Christmas Island to Nauru and Papua New Guinea; and
- 2) while the asylum seekers are being held in the Nauru and Manus Island RPCs.

Australia’s international obligations at each of these points will be considered.

At the heart of this debate lies the effectiveness of the international refugee law framework in compelling the state to assume responsibility for the asylum seeker. International refugee law and international human rights law are interlinked, however, while human rights treaties apply to all, the Refugee Convention is niche in its

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<sup>71</sup> Ben Doherty “‘It’s simply coercion’: Manus Island, Immigration policy and the men with no future” *The Guardian* (online ed, Australia, 28 September 2016).

<sup>72</sup> Nicole Hasham “Manus detention centre: PNG announces Australia has agreed to close centre” *The Sydney Morning Herald* (online ed, Australia, August 17 2016).

<sup>73</sup> Christmas Island is an island closer to Indonesia than to the Australian mainland, and is the destination of choice for asylum seekers crossing from Indonesia, usually at the southern tip of Java. The trip from Indonesia to Christmas Island is 321km long and takes three days. See: Luke Mogelson “The Dream Boat” (15 November 2013) *New York Times* <[www.nytimes.com](http://www.nytimes.com)>.

<sup>74</sup> Madeleine Gleeson “Factsheet: Offshore Processing”, above n 68, at 1.

<sup>75</sup> Refugee Council of Australia, above n 14, at 2.

<sup>76</sup> Peter Dutton “Address to the Australian Strategic Policy Institute, Canberra” (Australian Strategic Policy Institute, Canberra, 15 September 2016).

application to only refugees, and in some instances, asylum seekers. Where the Refugee Convention fails, human rights treaties may fill the gap in protection for those who have not had their status formally declared by the state. As a result, in this paper, both strands of law are considered.

#### *A The rights of refugees in the international arena*

It is important to establish from the outset where the rights of refugees and asylum seekers arise in the international arena. The main instrument establishing the rights of refugees, and by consequence, asylum seekers, are set out in the Refugee Convention and its Protocol. Australia is a party to the Refugee Convention and to several other treaties based in international human rights law, which include the International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT) and the Convention on the Rights of the Child (CRC), all of which protect, to varying extents, migrants who are forced to leave their homes due to persecution.<sup>77</sup>

States who are party to the Refugee Convention recognise that it is not illegal to seek asylum in an overseas country.<sup>78</sup> The Refugee Convention is grounded in Article 14(1) of the Universal Declaration of Human Rights (UDHR) stating that “everyone has the right to seek and to enjoy in other countries asylum from persecution”.<sup>79</sup> Article 31 of the Refugee Convention prohibits countries from imposing penalties on asylum seekers on account of “their illegal entry or presence”. This is interpreted globally as meaning; regardless of whether an asylum seeker arrives with a valid passport or the correct visas, he or she will be protected by the Refugee Convention and afforded asylum if he or she meets the criteria for a refugee.<sup>80</sup> Additionally, it is not required that an asylum seeker seek asylum from the first country they enter once fleeing from his or her home state.<sup>81</sup>

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<sup>77</sup> UNHCR *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* (April 2015) at 2. Australia became a party to the Refugee Convention on 22 January 1954, and its protocol on the 13 December 1973. Australia became a party to the CAT on 10 December 1985, to the ICCPR on the 13 August 1980, to the CRC 22<sup>nd</sup> August 1990. United Nations “Ratification of 18 International Human Rights Treaties - Australia” (2014) United Nations Human Rights Office of the High Commissioner <[www.indicators.ohchr.org](http://www.indicators.ohchr.org)>.

<sup>78</sup> Convention Relating to the Status of Refugee 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) and its Protocol Relating to the Status of Refugees 606 UNTS 267 (entered into force 4 October 1967).

<sup>79</sup> Universal Declaration of Human Rights, 217 A (III) (entered into force 10 December 1948), art 14.

<sup>80</sup> Andres Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary* (Oxford, Oxford University Press, 2011) at 1263.

<sup>81</sup> Jane McAdam and Fiona Chong *Refugees: Why Seeking Asylum is Legal and Australia’s Policies Are Not* (Sydney, UNSW Press, 2014) at 53; UNHCR “Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers” (May, 2013) at 3(i). “There is no obligation for asylum-seekers to seek asylum at the first effective opportunity, yet at the same time there is no unfettered right to choose one’s country of asylum. The intentions of an asylum-seeker, however, ought to be taken into account to the extent possible”

Globally, displaced persons are more likely to seek shelter in a neighbouring nation, in the hope that when the turmoil and violence in their own state subsides, they will be able to return easily to their homes.<sup>82</sup> For some, this is not an option, and they choose to seek refuge further afield.

The legality of seeking asylum without a passport – or even of arriving via a people smuggling service – is important in this discussion. Australian rhetoric on asylum seekers arriving by boat is that they are “illegal”, “jumping the queue” or “not genuine refugees”.<sup>83</sup> For many, however, there is not a queue to join.<sup>84</sup> Australia has stopped accepting asylum seekers from Indonesia, knowing that a majority of the asylum seekers who register with the UNHCR in Indonesia have come from further afield, usually with the intention of being smuggled into Australia by boat.<sup>85</sup> As Australia has been limiting the avenues of irregular immigration through the increasingly militarised boat turn-backs under OSB, asylum seekers in Indonesia and even further abroad are stranded,<sup>86</sup> unable to reach Australia by boat, but unable to be processed and start a new life in Indonesia. Indonesia, while it cooperates with the UNHCR, is not a state party to the Refugee Convention.<sup>87</sup>

Under the Refugee Convention, asylum seekers will be considered to be refugees if they:<sup>88</sup>

- 1) have a well-founded fear of persecution due to their race, religion, nationality, political opinion or membership of a particular social group;
- 2) they are outside their country of nationality; and
- 3) they are unable or unwilling to return to their country because of that fear.

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<sup>82</sup> 1.6 million Syrians reside in Jordan a massive make shift refugee camp that borders Syria. The burden on Jordan is huge, as it is a small developing nation with only six million people, and limited natural water access. Developing countries take the brunt of refugee crises such as the Syrian Civil War and the fallout from ISIS. See “Josh Rogin “U.S. and Jordan in Dispute Over Syrian Refugees” *Bloomberg* (online ed, United States of America, 6 October 2015).

<sup>83</sup> An example of this is Tony Abbot’s response to being asked about incoming asylum seekers: “I’m sorry. If you want to start a new life, you come through the front door, not through the back door.” See Lisa Cox “Nope, nope, nope’: Tony Abbott says Australia will not resettle refugees in migrant crisis” *The Sydney Morning Herald* (online ed, Sydney, 21 May 2015).

<sup>84</sup> Janet Phillips “Asylum seekers and refugees: what are the facts?” Parliamentary Research Papers, Social Policy Section (2 March 2015) at 5.

<sup>85</sup> ABC News “Asylum seekers registered with UNHCR in Indonesia after June no longer eligible for resettlement in Australia, Scott Morrison says” *ABC News* (online ed, Melbourne, 18 November 2014). In keeping with this, Australia has convinced Indonesian authorities from granting visas on arrival to Iranians. Iranians form the bulk of asylum seekers in the RPCs.

<sup>86</sup> Nikolas Feith Tan “State responsibility for international cooperation on migration control: the case of Australia” (2015) 5 *OxMo* 1 at 11.

<sup>87</sup> UNHCR “UNHCR Factsheet, Indonesia” (February 2016) at 2.

<sup>88</sup> Convention Relating to the Status of Refugee, above n 78, art 1.

While the policy is called “offshore processing”, this paper will not consider the process of becoming recognised as a refugee under the above definition, or how Nauru and Papua New Guinea “process” the asylum seekers, as it falls outside of its scope.<sup>89</sup> However, for the purposes of further discussion, it should be noted that a majority of the asylum seekers who have arrived by boat and been detained since 2012 have been found to be refugees under the definition of the Refugee Convention when eventually processed by Nauru and Papua New Guinea.<sup>90</sup>

## *B Australia’s obligations to asylum seekers before they are sent offshore*

Australia is likely to have international obligations towards asylum seekers processed in Christmas Island, even before they are sent onwards to Nauru and Papua New Guinea. The Refugee Convention and its Protocol “impose no automatic obligation on states to confer either permanent residence or citizenship on a person who arrives in their territory seeking asylum”.<sup>91</sup> However, it is arguable that the two most basic and crucial of the rights under the Refugee Convention depend only on an asylum seeker being physically present in a state, regardless of domestic immigration law.<sup>92</sup> It is thought that concept of non-refoulement, and the right to not be penalised for method of arrival, are the cornerstones of the Convention.<sup>93</sup> It is submitted that in sending asylum seekers to the RPCs, Australia has at times breached its international obligations.

### *1 Non-Refoulement*

Under international human rights and refugee law, 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

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<sup>89</sup> The definition of what kind of persecution makes a refugee is constantly in discussion. Recent cases have concluded that sexual orientation is a form of persecution and it has been widely incorporated into the definition. A more current discussion is that of climate refugees – do changes in environment that are making some nation states unliveable make someone a refugee? As the definition is fluid, it falls outside of the narrow scope of this paper. Such discussions are however important as the changing nature of the definition keep the Refugee Convention relevant.

<sup>90</sup> Between 70 and 97 percent of those entering Australia by boat are found to be genuine refugees. See Janet Phillips, above n 83, at 8. The Expert Panel puts this figure higher, holding that 90 percent of irregular migrants prior to 2012 had successfully been granted refugee status, with the further 10 percent under review. See Australian Government *Report of the Expert Panel*, above n 52, at 1.24.

<sup>91</sup> Mary Crock and Kate Bones “Australian Exceptionalism: Temporary Protection and the Rights of Refugees” (2015) 16 *Melb J Intl Law* 1 at 5.

<sup>92</sup> Mary Crock and Kate Bones “Australian Exceptionalism”, above n 91 at 3.

<sup>93</sup> See for example: Mark R. von Sternberg, “Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection” (2014) 2 *J Migration & Hum Sec* 329 at 330; Angus Francis, above n 69 at 276; Mary Crock and Kate Bones above n 91 at 3.

sent elsewhere where he or she might face a real risk of persecution or significant harm.<sup>94</sup> This is the concept of non-refoulement. This principle is largely considered to be a non-derogable right that applies at all time, and has crystallised into customary international law.<sup>95</sup> The central purpose of the customary rule determines its scope and application.<sup>96</sup> Non-refoulement's central purpose is the prohibition of the return, in any manner whatsoever, of persons to countries where they may face persecution or significant harm.<sup>97</sup> The scope of the concept across international law is applied much more widely than merely to refugees.<sup>98</sup> It is however, especially relevant in refugee law and under the Refugee Convention as asylum seekers are particularly vulnerable to return by hostile receiving states.<sup>99</sup> The concept in international law is intended to regulate state action wherever it takes place.<sup>100</sup>

Australia's non-refoulement obligations do not just arise from the Refugee Convention, but inter alia from multiple international human rights treaties, each of which considers the concept to be an essential right.<sup>101</sup> While this includes an express prohibition on refoulement in Article 33 of the Refugee Convention, it also comprises of an express prohibition on refoulement under Article 3 in the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT) and an implied prohibition on refoulement in the International Covenant on Civil and Political Rights (ICCPR).<sup>102</sup> It is widely accepted that the principle of non-refoulement applies not only to recognised convention refugees, but also to those who have not had their status as refugees formally declared by the receiving state.<sup>103</sup> Accordingly, the principle of non-refoulement is of particular relevance to asylum seekers, and therefore central to this discussion.

While Australia may not send asylum seekers to a country where they would be in danger, it also cannot send asylum seekers indirectly to a place where they may be caused harm. This is the concept of "chain refoulement".<sup>104</sup> In relation to the bilateral

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<sup>94</sup> Convention Relating to the Status of Refugees, above n 78, art 3.

<sup>95</sup> Alice Edwards "Temporary Protection, Derogation and the 1951 Refugee Convention" (2012) 13 Melbourne J of Intl Law 595 at 623.

<sup>96</sup> Mark R. von Sternberg, above n 93, at 331.

<sup>97</sup> Guy Goodwin-Gill *The Refugee in International Law* (New York, Oxford University Press, 1996) at 143.

<sup>98</sup> UNHCR *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) at 8.

<sup>99</sup> UNHCR *Advisory Opinion on the Extraterritorial Application of Non-Refoulement*, above n 98, at 8.

<sup>100</sup> Guy Goodwin-Gill *The Refugee in International Law*, above n 97 at 143.

<sup>101</sup> Madeleine Gleeson "Factsheet: Offshore Processing", above n 68 at 6.

<sup>102</sup> UNHCR *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, above n 98 at 8.

<sup>103</sup> Guy Goodwin-Gill *The Refugee in International Law*, above n 97 at 143.

<sup>104</sup> Kaldor Centre with Jane McAdam and Joyce Chia "Joint Submission to the Senate Legal and Constitutional Affairs References Committee on the Inquiry into the Incident at the Manus Island Detention Centre from 16 to 18 February 2014" (2 May 2014) at 13.

agreements for the transfer of asylum seekers between States, such as those that exist between Australia and Papua New Guinea and Nauru, the UNHCR holds that the transferring state remains subject to the obligation of non-refoulement, and that the transferring state may retain responsibility for other obligations under international human rights law and refugee law.<sup>105</sup> By having sent prospective asylum seekers to Nauru and Papua New Guinea, it is likely that Australia has breached non-refoulement obligations under two different avenues across all three treaties:

- 1) refoulement to conditions amounting to significant harm, including cruel, inhumane, or degrading treatment; or
- 2) refoulement to the risk of persecution.

In order to fulfil its non-refoulement obligations, Australia must assess on a case-by-case basis whether or not each asylum seeker it sends offshore will be safe in the RPC. The decision to remove asylum seekers to Nauru and Papua New Guinea needs to be more considered than the cursory screening that was allegedly afforded to those who arrived at Christmas Island.<sup>106</sup> For some, this will be an individual assessment. Children, pregnant women and unwell or particularly vulnerable asylum seekers are unlikely to thrive in the environment in of the processing centres.

Internationally, there is an argument that if violations of human rights, or the conditions themselves at an immigration detention centre, reach a certain level, described by the European Court of Human Rights (ECHR) as a “minimum level of severity”, then there may be a general presumption that sending asylum seekers to the detention centre will amount to significant harm and therefore will be a breach of non-refoulement obligations.<sup>107</sup> The ECHR has held that the “assessment of this minimum [risk] is relative; it depends on all the circumstance of the case, such as the duration of the treatment and its physical and mental effects, and in some instances the sex, age and state of health of the victim.”<sup>108</sup>

In Europe, since January 2011, the above presumption arose against returning asylum seekers to Greece. Under the Dublin Convention, states of the European Union (EU) can return asylum seekers to the first country they entered, unless doing so would breach their obligations under international law.<sup>109</sup> Here, the ECHR held that Belgium had violated its non-refoulement obligations by returning an asylum seeker to Greece.

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<sup>105</sup> UNHCR “Guidance Note on bilateral and/ or multilateral transfer arrangements of asylum seekers” (May 2013), at [3][vi].

<sup>106</sup> Refugee Council of Australia, above n 14, at 1.

<sup>107</sup> *MSS v Greece and Belgium* (2011) 53 EHRR 2 at [219].

<sup>108</sup> *MSS v Greece and Belgium*, above n 107, at [219].

<sup>109</sup> European Court of Human Rights “Dublin Cases” (press release, July 2015) at 1.

In Greece, asylum seekers were being detained in unsatisfactory conditions - the facilities were overcrowded and unsanitary, and there were reports of police brutality against asylum seekers.<sup>110</sup> In light of this decision, many EU nations stopped returning asylum seekers to Greece.<sup>111</sup>

While asylum seeker processing in the EU differs from the arrangements established by Nauru, Papua New Guinea and Australia, and decisions by the ECHR are not binding on those three countries, this decision offers influential guidance. If conditions in Manus Island and Nauru are systematically so poor that they reach the threshold of a “minimum level of severity” for *all* asylum seekers, there may arise a presumption that every removal offshore violates Australia’s non-refoulement obligations.<sup>112</sup> Compiling all available information on conditions in the RPCs, especially those most recently contained in the Nauru Files, it is likely that at various points across the operation of the RPCs conditions will have reached this “minimum level”.<sup>113</sup> Reports from the RPCs of critical shortages of clothing, medical supplies and overcrowding in canvas tents with no ventilation mean that conditions are likely to be akin to those in immigration detention in Greece.<sup>114</sup> One specific point that can be isolated as particularly dangerous for asylum seekers to be sent to the RPCs are the periods before and after the riots in Manus Island and Nauru. Conditions at this time were so inflammatory that asylum seekers could be, and were, severely hurt. Further, the detention centres themselves in Nauru and Manus Island have been shown to be incrementally damaging to the mental health and physical safety of asylum seekers the longer that they are housed there.<sup>115</sup> This would lead to a conclusion that Australia has breached multiple international instruments as they continued to send asylum seekers to the RPCs during these periods, and for continuing to send them after knowing the mental damage that is accrued by being detained in these centres for long periods of time.

Alternatively, the removal of certain asylum seekers to the RPCs may violate Australia’s non-refoulement obligations as a result of individual persecution in Nauru and Papua New Guinea.<sup>116</sup> There are reports that homosexual and Muslim asylum seekers face persecution in Manus Island on the basis of their sexuality and religion.<sup>117</sup> Homosexuality was only very recently decriminalised in Nauru, and attitudes towards

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<sup>110</sup> Madeleine Gleeson “Factsheet: Offshore Processing”, above n 68, at 7.

<sup>111</sup> Madeleine Gleeson “Factsheet: Offshore Processing”, above n 68, at 7.

<sup>112</sup> Madeleine Gleeson “Factsheet: Offshore Processing”, above n 68, at 7.

<sup>113</sup> Editorial “The Nauru Files”, above n 7.

<sup>114</sup> Madeleine Gleeson *Offshore: Behind the wire on Manus and Nauru* (New South Wales, NewSouth Publishing, 2016) at 191.

<sup>115</sup> Madeleine Gleeson *Offshore*, above n 114, at 22.

<sup>116</sup> Madeleine Gleeson “Factsheet: Offshore Processing”, above n 68, at 7.

<sup>117</sup> Ben Doherty and Shane Bazzi “Manus Island detainee fears jail for homosexuality if rape reported to police” *The Guardian* (online ed, Australia, 27 November 2014).

homosexuality in both nations are conservative.<sup>118</sup> Homosexuality is still a crime punishable in Papua New Guinea of up to fourteen years imprisonment.<sup>119</sup> The dominant religion in both countries is Christianity, and both nations have a local intolerance to the Islamic faith.<sup>120</sup> In addition to this, women have reported feeling threatened by locals in Nauru, and the Nauru Files contain evidence of wide ranging sexual abuse and threatened or attempted sexual assault.<sup>121</sup> The likelihood of such persecution must be assessed in each case, with any asylum seeker found to be at risk not sent to the RPC in the first place, or removed immediately if discovered to be at risk of such persecution.<sup>122</sup>

## 2 *Non-Penalisation*

As discussed in Part A, Article 31 of the Refugee Convention establishes that an asylum seeker who arrives without the proper documentation is not to be penalised for doing so.<sup>123</sup> This is an acknowledgment of the fact that often the conditions that force many asylum seekers to leave their home states do not allow for the proper procurement of visas and passports, and that visas and passports may have been obtained through deceptive measures.<sup>124</sup> Removing asylum seekers to RPCs with the express intention of holding them in detention until their claims are processed, and delaying the processing so that it mirrors long wait times overseas, is likely to be considered penalisation of the asylum seekers for the method by which they arrived.<sup>125</sup> (In fact, as discussed below, the detention itself in such circumstances may also be considered to be arbitrary, and is therefore a breach of multiple international treaties to which Australia is a party.) The policy of Australia to send the asylum seekers who arrive by boat to the Nauru and Papua New Guinea RPCs is likely to be a breach of Article 31 of the Convention.

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<sup>118</sup> Reuters “Nauru decriminalizes homosexuality and suicide” *news.com.au* (online ed, Canberra, 31 May 2016).

<sup>119</sup> Ben Doherty and Shane Bazzi “Manus Island detainee fears jail for homosexuality if rape reported to police” *The Guardian* (online ed, Australia, 27 November 2014).

<sup>120</sup> See: “Nauru country profile” (2016) BBC News <[www.bbcnews.com](http://www.bbcnews.com)> and “Papua New Guinea country profile” (2016) BBC News <[www.bbc.com](http://www.bbc.com)>.

<sup>121</sup> Editorial “The Nauru Files”, above n 7.

<sup>122</sup> Madeleine Gleeson “Factsheet: Offshore Processing”, above n 68, at 7.

<sup>123</sup> Convention Relating to the Status of Refugee, above n 78, art 31.

<sup>124</sup> Jane McAdam and Fiona Chong, above n 81, at 53.

<sup>125</sup> Guy Goodwin-Gill “Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention and protection” Erika Feller, Volker Turk and Francesca Nicholson (ed) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protections* (Cambridge, Cambridge University Press, 2003) at 221.

A broader question is whether or not Australia can be held responsible for the treatment of asylum seekers after they have arrived in Manus Island or Nauru. While asylum seekers will only spend a few nights on Christmas Island before being sent to the Manus Island or Nauru RPC, those who arrived in the RPCs after July 2013 will remain there unless they decide to return to their home country, are resettled in the Nauru or Papua New Guinea community, or are sent on to be resettled in a third-party state.<sup>126</sup> While there have been no new arrivals since December 2014, only five asylum seekers have elected to go to Cambodia.<sup>127</sup> The rest have remained, waiting finalised resettlement.<sup>128</sup> For some this process has taken over 730 days.<sup>129</sup>

Australian governments, led by Turnbull, Abbott, Rudd and Gillard, have advanced two repetitive arguments towards denying and mitigating any international responsibility that Australia may continue to owe to asylum seekers held in the RPCs.<sup>130</sup> It has been argued that as Nauru and Papua New Guinea are sovereign nations, Australian laws cannot and do not apply, and failing this, that Australia does not have the “very high level of control” needed to have its human rights obligations extend extraterritorially.<sup>131</sup> Both arguments will be addressed. It is contended that these arguments are fallacious and designed to avoid Australia’s international responsibility for the asylum seekers held in deplorable conditions in both island states. Australia’s establishment of migration control outside of the state challenge the underlying assumptions of international refugee and human rights law; however, the application of an extraterritorial human rights jurisdiction, and the general international law doctrine of state responsibility may meet this challenge by establishing Australian responsibility.

For Australia to retain responsibility for asylum seekers held in the RPCs overseas, Australia’s human rights obligations will have to extend extraterritorially. This is a developing concept in recent case law and scholarship, with international and regional courts, most notably the ECHR, considering that in relation to a human rights obligation or treaty, the concept of a state’s “jurisdiction” is not limited purely to a territorial or “Westphalian” definition. The Courts have taken a more functional approach to

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<sup>126</sup> The only third party state that has offered resettlement thus far is Cambodia. See Madeleine Gleeson “Australia-Cambodia Refugee Relocation Agreement is Unique, But Does Little to Improve Protection” (21 September 2016) Migration Policy Institute <[www.migrationpolicy.org](http://www.migrationpolicy.org)>.

<sup>127</sup> Elibritt Karlsen, above n 22, at 8.

<sup>128</sup> Apart from the five that have been sent to Cambodia. Every other departure has been voluntary return to their home state. See Elibritt Karlsen, above n 22, at 8.

<sup>129</sup> Australian Government Department of Immigration and Border Protection *Department of Immigration and Border Protection – Annual Report 2014-2015* (September 2015) at 180, table 55.

<sup>130</sup> Madeleine Gleeson “Factsheet: Offshore Processing”, above n 68, at 11.

<sup>131</sup> Madeleine Gleeson “Factsheet: Offshore Processing”, above n 68, at 11.

defining where a state's jurisdiction will begin and end.<sup>132</sup> In keeping with this, many courts now consider that when State A has "effective control" within the territory of State B, State A may be considered to have many of the same human rights obligations that it would have inside its own borders.<sup>133</sup> It is contended that, regardless of domestic decisions, Australia exercises the aforementioned control over the processing centres in Nauru and Papua New Guinea, and therefore its human rights obligations will apply. Additionally, the general international law doctrine of state responsibility may hold Australia responsible, either for the actions of state parties on the RPCs, or as a state aiding and abetting an internationally wrongful act.

A separate issue is this: while human rights obligations contained in treaties such as the ICCPR are likely to apply extraterritorially, rights afforded in the Refugee Convention may not. The Refugee Convention itself was drafted on the concept of a traditional interpretation of territoriality.<sup>134</sup> The Refugee Convention is unique in that the rights afforded under the Convention – with the exception of the concept of non-refoulement under Article 33 discussed above – develop incrementally as the relationship between the asylum seeker and the state deepens.<sup>135</sup> As the refugee has not been acknowledged to be "lawfully staying" in Australia, it is likely that the full breadth of economic, social and political rights contained within the convention may not apply to the asylum seeker held in the RPC.

### *1 The extraterritorial application of human rights*

The extraterritorial applicability of human rights is a developing concept in international law. Human rights are characterised as "universal" in nature, however their universality is at odds with a traditional Westphalian conceptualisation of sovereignty.<sup>136</sup> A human right is considered to be within the vertical relationship that occurs between citizen and state. Inside a state's territory, the "effective control" flows from the internationally accepted formal entitlement to exercise sovereign authority.<sup>137</sup>

However, many international and regional courts have been trying to strike a new balance between notions of sovereignty and the universal need to uphold human rights. This has often come down to two differing concepts of jurisdiction. A traditional

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<sup>132</sup> Thomas Gammeltoft-Hansen "Growing Barriers: International Refugee Law" in Mark Gibney and Sigrun Skogly (ed) *Universal Human Rights and Extraterritorial Obligations* (Philadelphia, University of Pennsylvania Press 2010) at 56.

<sup>133</sup> See for example: *Al-Saadoon and Mufdhi v. United Kingdom* [2010] 51 EHRR 9; *Medvedyev and Others v. France* [2010] 51 EHRR 39; *Hirsi Jamaa and Others v. Italy* [2012] 55 EHRR 2.

<sup>134</sup> Gammeltoft-Hansen, above n 132, at 63.

<sup>135</sup> Mary Crock and Kate Bones, above n 91, at 3.

<sup>136</sup> Gammeltoft-Hansen, above n 132, at 58.

<sup>137</sup> Gammeltoft-Hansen, above n 132, at 66.

conceptualisation of jurisdiction is related closely to traditional interpretations of territoriality and sovereignty. A more functional approach towards jurisdiction has turned on the test of “effective control”.<sup>138</sup>

Most human rights treaties involve the concept of a state’s jurisdiction, which is the area in which a state is charged with the protection of all those inside of it. For example, Article 2(1) of the ICCPR holds that:<sup>139</sup>

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its *jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Treaty monitoring bodies have increasingly elucidated that a state’s jurisdiction under various international human rights instruments can and does extend beyond its sovereign borders.<sup>140</sup> In interpreting the ICCPR’s jurisdictional provision above, the United Nations Human Rights Committee (UNHRC) has applied an expansive approach which includes extraterritorial responsibilities. This includes where state agents have committed human rights breaches to an individual in another state (personal jurisdiction), where there was effective control of an area (spatial jurisdiction), and where the applicant was residing abroad.<sup>141</sup> The Inter-American Commission on Human Rights (IACHR) has picked up on this line of reasoning, in relation to the American Convention on Human Rights, noting that the term “jurisdiction” in the sense of Article 1(1) is not limited to a reading merely coextensive with national territory.<sup>142</sup> Rather, the IACHR is of the view that a state party may be responsible for the acts and omissions of its agents which produce effects or are undertaken outside the state’s territory.<sup>143</sup> This broader definition of jurisdiction has been reaffirmed at various times by the UNHCR, the UN Committee Against Torture, the ICJ and the ECHR, which have all concluded that it would be inconsistent with the obligations that states assume under human rights treaties for them to be able to commit violations overseas which they would be prohibited from committing within their own territories.<sup>144</sup>

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<sup>138</sup> Hugh King “The Extraterritorial Human Rights Obligations of States” (2009) 9 HRLR 521 at 523.

<sup>139</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) (hereafter referred to as ICCPR), art 2(1). (Emphasis added).

<sup>140</sup> Patrick Van Berlo, above n 30, at 20.

<sup>141</sup> Patrick Van Berlo, above n 30, at 21.

<sup>142</sup> Oona Hathaway and Elizabeth Nielsen, Aileen Nowlan, William Perdue, Chelsea Purvis “Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?” (2011) 43 Ariz St L J 389 at 405.

<sup>143</sup> Oona Hathaway “Human Rights Abroad”, above n 142 at 405.

<sup>144</sup> Hugh King, above n 138, at 556.

If the concept of jurisdiction can be extended to include actions that occur outside of a state's traditional border, states can commit human rights violations extraterritorially. The test for extraterritorial application of human rights treaties turns on the government's "effective control" over the territory, person or situation in question.<sup>145</sup> The UNHCR has generally recognised that a state has jurisdiction and is bound by both international human rights and refugee law if it has either de jure or de facto control over the territory or persons.<sup>146</sup>

A series of cases decided by international and regional bodies support the assertion that Australia exercises sufficient authority and control over asylum seekers detained in the Nauru and Papua New Guinea RPCs to enliven its jurisdiction for human rights purposes.<sup>147</sup>

The ECHR is the biggest proponent in advancing the concept of extraterritorial human rights under the European Convention on Human Rights. Relevantly, in *Al Saadoon v UK*, the ECHR applied a standard of "effective control".<sup>148</sup> In *Al Saadoon*, two Iraqi men who were involved in the murder of two British soldiers were detained by the UK and then transferred into Iraqi custody.<sup>149</sup> The ECHR found that the UK had violated several articles of the European Convention on Human Rights by transferring them to Iraqi custody when they faced "a real risk of being sentenced to death and executed".<sup>150</sup> The Court held that the UK had exercised "exclusive control" over the detention facilities, and the UK's military and legal authority in the country at the time ensured the "total and exclusive de facto and subsequent de jure control" over the premises and thus the individuals in question.<sup>151</sup>

## 2 *Australia and "effective control"*

A lack of clear and consistent information about the internal management of the centres coupled with the slow drip feed of information, especially since anti-whistleblowing legislation was enacted in 2014, makes it difficult to establish whether Australia's level of involvement is likely to meet the test of "effective control", and therefore whether

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<sup>145</sup> Oona Hathaway, above n 142, at 390. "All but one of the jurisdictions we examine here has articulated a test for the extraterritorial application of human rights treaties that turns on the government's "effective control" over the territory, person or situation in question."

<sup>146</sup> UNHCR *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (May, 2013) at [2].

<sup>147</sup> Oona Hathaway, above n 142, at 390 – 417.

<sup>148</sup> Oona Hathaway, above n 142, at 407.

<sup>149</sup> *Al-Saadoon and Mufdhi v. United Kingdom* [2010] 51 EHRR 9 at [40] – [41].

<sup>150</sup> *Al-Saadoon and Mufdhi v. United Kingdom*, above n 149, at [135].

<sup>151</sup> Oona Hathaway, above n 142, at 407.

Australia can be held responsible for breaches of extraterritorial human rights. A finding of “effective control” is likely to turn on the facts provided. However, it is submitted on the available information about conditions of the RPCs that Australia is likely to exercise the requisite “effective control”.

To some extent, the question of whether or not Australia has “effective control” in Nauru has been addressed domestically by the High Court of Australia.<sup>152</sup> In February 2016, the High Court handed down its judgment in a case involving a pregnant Bangladeshi asylum seeker who had been housed in the Nauru RPC until she had been flown to Australia for medical treatment.<sup>153</sup> In perhaps what was one of the best chances to domestically influence the policy of offshore processing, the Australian High Court came to the conclusion that the Australian government’s actions overseas were justified domestically. Six of the seven judges found that whatever the Australian government’s involvement, it was not acting outside the powers conferred on it by domestic legislation.<sup>154</sup> This finding meant that Australia could resume sending asylum seekers to Nauru.<sup>155</sup>

As is noted by the Law Council of Australia and the UNHCR, the decision of the High Court does not affect Australia’s obligations under international law, even if the decision itself has provided a position on the constitutionality of Australia’s offshore immigration detention arrangements.<sup>156</sup> However, in what commentators have held to be a “glimmer of hope” in the judicial review of offshore processing,<sup>157</sup> to some extent all judges found that some level of Australian participation in the detention of asylum seekers on Nauru was “indisputable”.<sup>158</sup> Justice Bell held that Australia had “exercised effective control” over the detention of the asylum seekers in Nauru, while Justice

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<sup>152</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*, above n 65. In February 2016, the High Court handed down its judgment in a case involving a pregnant Bangladeshi asylum seeker who had been housed in the Nauru RPC until she had been flown to Australia for medical treatment. She did not want to return to Nauru, and a case was launched on her behalf by the Australian Human Rights Law Centres. In the meantime, she delivered her baby in Australia.

<sup>153</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, above n 65 at [14].

<sup>154</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, above n 65, at [54] per French J, [187] per Gageler J, [265] per Keane J. Gordon J dissented holding that s 198AHA “is beyond power and therefore invalid” [418].

<sup>155</sup> AAP “Asylum seeker families face deportation to Nauru after High Court Ruling” *Special Broadcasting Service* (online ed, Sydney, 03 Feb 2016).

<sup>156</sup> Law Council of Australia “Submission to the Senate Legal and Constitutional Affairs References Committee on the Condition and treatment of asylum seekers and refugees at the regional processing centres of the Republic of Nauru and PNG” (17 March 2016); UNHCR *Detaining asylum seekers and refugees in offshore detention centres subject to international obligations, despite High Court decision* (5 February 2016).

<sup>157</sup> Madeleine Gleeson “Glimmers of hope for detained asylum seekers in the High Court’s Nauru decision” (February 3 2016) *The Conversation* <[www.theconversation.com](http://www.theconversation.com)>.

<sup>158</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, above n 65 at [41].

Gageler found that Australia had procured the detention of asylum seekers on Nauru through its contractors who exercised physical control over them.<sup>159</sup>

Under the international approach to the test of “effective control” applied above by the ECHR, it could be concluded that under a functional reading of jurisdiction, Australia retains sufficient control as it exercises “undisputable” control over the RPC. Judgments of the ECHR in Australia are not binding, and in fact, it has been suggested by some that to interpret Australian domestic law in line with EU provisions would be “heretical”.<sup>160</sup> Regardless, the ECHR line of case law provides some insight into how an international court may view the Australia and Nauru/Papua New Guinea relationship.

The full court in *M68/2015 v Minister for Immigration and Border Protection* relied on the tenuous link that private international companies provide security obligations rather than the Australian government.<sup>161</sup> It would have been much harder to argue that the Australian government did not have “effective control” if instead of Wilson Security, or G4S, Australian Immigration and Border Protection were carrying out the security functions on Nauru. In fact, Australia exercises significant control over staffing, funding and operations at the Nauru and Papua New Guinea detentions centres.<sup>162</sup> Australia selects who is to be transferred to the Centre, and acknowledges that asylum seekers are under its jurisdiction prior to being transferred. Australia funds both the centres, and perhaps, most fundamentally, the very existence of the centres is dependent on Australia.<sup>163</sup> Australia is likely to be found to meet this international test of “effective control” considering the chequered history of the RPCs, and Australia’s pivotal role within them.

### 3 *An internationally wrongful act: would Australia meet the test?*

At the level of general international law there exists a set of rules that outline how state responsibility may be established for international wrongful acts.<sup>164</sup> State responsibility is a distinct concept in international law that differs from that of sovereignty. As advanced above, a common refrain of the Australian government in an attempt to abrogate responsibility for the asylum seekers held in the RPCs is that Australian law and its international responsibilities do not extend to the asylum seekers held in

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<sup>159</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*, above n 65, at [93] per Bell J, [172] per Gageler J.

<sup>160</sup> Patrick Van Berlo, above n 30, at 20.

<sup>161</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*, above n 65, at [172].

<sup>162</sup> Nikolas Feith Tan, above n 86, at 15.

<sup>163</sup> Nikolas Feith Tan, above n 86, at 15.

<sup>164</sup> Nikolas Feith Tan, above n 86, at 15.

sovereign states, as the law and international obligations of Nauru and Papua New Guinea's supersedes that of Australia. However, though the two notions have overlap, state responsibility and sovereignty are differing concepts. The undisputed principle that Nauru and Papua New Guinea are sovereign states does not preclude Australia from bearing state responsibility towards the asylum seekers held in the processing centres.

The rules for state responsibility are contained in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.<sup>165</sup> Under Article 2, there are two elements to an internationally wrongful act. The first is attribution: the act must be attributable to the state under international law. The second is that the act must be a "breach of an international obligation" in force for the state at the time of the breach.<sup>166</sup>

The International Court of Justice has held that it is a "well-established rule, one of the cornerstones of the law of state responsibility, that the conduct of any state organ is to be considered an act of the State under international law".<sup>167</sup> Therefore, the conduct of a state's agents, whether they exercise judicial, constitutional, executive or legislative power, can be attributed to the state, including the actions of agents of territorial units and subdivisions, or of public or private enterprises.<sup>168</sup> Rules of attribution also apply even if entities act *ultra vires*, so long as they act with capacity.<sup>169</sup> The only acts that are excluded are truly private acts, having no connection to official functions, not being committed by an agent or a civil servant of the state or a person acting with governmental authority.<sup>170</sup>

Here, it is arguable that this exception does not apply. Actions on Nauru and Papua New Guinea are sanctioned and encouraged by the Australian government, which has deliberately implemented these policies and placed people on the islands with the responsibility of carrying out the policies of the Australian government. Therefore, the actions of government bodies in the RPCs will be attributable to Australia, regardless

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<sup>165</sup> International Law Commission, Responsibility of States for Internationally Wrongful Acts, annexed in UN General Assembly Resolution 56/83 12 December 2011.

<sup>166</sup> International Law Commission, Responsibility of States for Internationally Wrongful Acts, above n 165, art 2.

<sup>167</sup> Brigitte Stern "The Elements of an Internationally Wrongful Act" in James Crawford, Alain Pellet and Simon Olleson (ed) *The Law of International Responsibility*, Chapter: The Elements of an Internationally Wrongful Act (New York, Oxford University Press, 2010) at 203.

<sup>168</sup> Brigitte Stern, above n 167, at 203.

<sup>169</sup> Brigitte Stern, above n 167, at 203.

<sup>170</sup> Brigitte Stern, above n 167, at 203.

of whether the actions occur in Australian territory or in the territory of a sovereign state in an offshore processing country.<sup>171</sup>

If Australia does not meet the above test of attribution, Australia could still be held responsible under Article 16, by aiding and abetting Nauru and/or Papua New Guinea in an international wrongful act. A state that aids and assists another state in the commission of an international wrongful act is responsible for doing so if that state does so with the knowledge of the circumstances of the internationally wrongful state.<sup>172</sup> Article 16 does not require attribution, as the state does not carry out the act. Under the MOU between Australia, Papua New Guinea and Nauru, Australia provides all kinds of assistance to the processing centres. There is an argument that the aid and assistance needs to be “essential to the performance, but must contribute significantly to the act”.<sup>173</sup> Importantly, the commentaries to the ILC Articles include “financing the activity in question” as an example of meeting the requirements of Article 16, which would seem to encompass the role that Australia has played in assuming the financial burden of the RPCs.<sup>174</sup>

Problematically, this kind of derived responsibility on the basis of aid or assistance is that it requires the assisting state to provide such assistance “with knowledge of the circumstances of the international wrongful act”, which has been interpreted by the International Law Commission as not only containing a requirement of knowledge, but also of intent.<sup>175</sup> Thus aid, and assistance, must be provided with the goal of enabling the commission of an international wrongful act.<sup>176</sup> Australia would need to therefore meet this test of knowledge and intent in regards to actions committed in Nauru and Papua New Guinea. Arguably, Australia has full knowledge of what occurs in the processing centres, and intent would stem from the simple fact that Australia placed the asylum seekers on the islands under their policy of offshore processing.

However, the law of international responsibility is still a developing area. There is little jurisprudence on what constitutes aiding and abetting another state to commit an international wrongful act, and therefore there can be little consensus on whether or not Australia’s actions would meet this test. The lack of transparency about the inner workings of the RPCs means that the extent of the Australian government’s role is

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<sup>171</sup> Madeleine Gleeson “Factsheet: Offshore Processing”, above n 68, at 4.

<sup>172</sup> International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, above n 165, art 16.

<sup>173</sup> Nikolas Feith Tan, above n 86, at 15.

<sup>174</sup> International Law Commission, “Draft articles on Responsibility for Internationally Wrongful Acts with commentaries” (A/56/10) 2001, at 66.

<sup>175</sup> International Law Commission, “Draft articles on Responsibility for Internationally Wrongful Acts with commentaries”, above n 174, at 65.

<sup>176</sup> Nikolas Feith Tan, above n 86, at 15.

unclear. Further judicial attention would be required here; although arguably, if a domestic court was to review this question again soon, a similar conclusion would be reached as in the *M68/2015* judgment, that transferred asylum seekers were in the Courts opinion detained in custody under the laws of Nauru.<sup>177</sup>

#### 4 *A consideration of international rights breached*

Both the applicability of state responsibility and the extraterritorialisation of human rights hinge on an international obligation being breached by the actions of Australia. Australia has voluntarily assumed a range of human rights obligations under international treaties, which include the ICCPR, the CRC and the CAT.<sup>178</sup> Over the past four years, extensive reporting of the treatment of the asylum seekers in Nauru and Papua New Guinea, and the conditions of the RPCs, suggest that states with duties to respect and protect the rights of these individuals have breached any number of their international obligations. The Nauru Files have tabulated two thousand reports used by the security companies and varying NGOs on the island to file complaints received by asylum seekers between 2013 and 2015.<sup>179</sup> From the contents of these reports, asylum seekers in the processing centre on Nauru have been subjected to sexual assault (by both other detainees and security personnel) and violence, they have committed self-harm, been deprived of medical treatment and supplies, and are subjected to a uncertain and prolonged waiting period that has had a serious impact on the state of the mental health of the asylum seekers and their families.<sup>180</sup>

The rights that have been alleged to have been breached over the past four years have been the right to life under the ICCPR relating to the death of Reza Barati; unjustified restriction of movement; rights under the CAT, including cruel, inhumane and degrading treatment, especially considering the wider definition of mental torture; and, various rights under the CRC relating to the welfare of children, and the detention of children.

Of the international rights breached by offshore processing, the arbitrary deprivation of liberty is arguably the most important of the rights, and thus the one that is discussed in the greatest detail. Protection from arbitrary detention is one of the most important

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<sup>177</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, above n 65, at [34] per French J.

<sup>178</sup> Australia became a party to the CAT on 10 December 1985, to the ICCPR on the 13 August 1980, to the CRC 22<sup>nd</sup> August 1990. See for example: UNHCR *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* (April 2015) at 2, and United Nations “Ratification of 18 International Human Rights Treaties - Australia” (2014) United Nations Human Rights Office of the High Commissioner <[www.indicators.ohchr.org](http://www.indicators.ohchr.org)>.

<sup>179</sup> Editorial “The Nauru Files”, above n 7.

<sup>180</sup> Editorial “The Nauru Files”, above n 7.

of the rights granted under the ICCPR that has been breached by Australia's role in the RPCs in Nauru and Papua New Guinea.<sup>181</sup> As every asylum seeker held in the RPCs since they were reopened in 2012 has been detained for varying, but increasingly prolonged, periods of time, it is this right that is the most likely to be applicable to all.<sup>182</sup> In holding the asylum seekers indefinitely in the processing centres, some commentators have suggested that the RPCs have doubled as conventional detention centres.<sup>183</sup> As the long waiting periods for processing have been extended, especially after it was decided in July 2013 that no asylum seeker that arrived by boat would be resettled in Australia, and the search for another country in which to resettle these asylum seekers has proved increasingly futile, some asylum seekers have been held in the processing centres for up to three years.<sup>184</sup> At times, the uncertainty about their future has caused tempers to flare, and peaceful protests have turned violent, such as in the case of the riots that occurred both in the Manus Island RPC and on Nauru in 2013 and 2014.<sup>185</sup>

The right to liberty was granted by the General Assembly in the UDHR, and is enshrined in Article 9 of the ICCPR. Article 9 holds that:<sup>186</sup>

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The detention of asylum seekers is not a new concept nor one that is exclusive to Australia. In many cases globally, states hold migrants in immigration detention for short periods of time as security checks are carried out.<sup>187</sup> What makes Australia's detention unique is that it occurs extraterritorially, and that the asylum seekers are held for such a prolonged period of time. On the subject, the UNHRC holds that there are some circumstances in which the detainment of asylum seekers is permissible, stating that:<sup>188</sup>

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<sup>181</sup> ICCPR, above n 139, art 9.

<sup>182</sup> Azadeh Dastyari, above n 23, at 674.

<sup>183</sup> See: Azadeh Dastyari, above n 23, Claire Henderson, above n 26, Kaldor Centre with Jane McAdam and Joyce Chia "Joint Submission to the Senate Legal and Constitutional Affairs References Committee on the Inquiry into the Incident at the Manus Island Detention Centre from 16 to 18 February 2014" (2 May 2014).

<sup>184</sup> Madeleine Gleeson *Offshore*, above n 114, at 385 – 398.

<sup>185</sup> Latika Bourke "Manus Island riot: Independent report by Robert Cornall details deadly detention centre violence" *ABC News* (online ed, Sydney, 27 May 2014).

<sup>186</sup> ICCPR, above n 139, art 9(1).

<sup>187</sup> UNHCR *Beyond Detention: Strategy to support governments to end the detention of asylum-seekers and refugees 2014-2019* at 5.

<sup>188</sup> UN Human Rights Committee "Draft General Comment No. 35, Article 9: Liberty and Security of Person" 28 January 2013 at [18].

The detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary.

Australia's detention of the asylum seekers goes beyond this, and is likely to stray into the realm of arbitrary detention. The long periods of time in which the asylum seekers have been held is neither "reasonable, necessary nor proportionate".<sup>189</sup> Conditions on Nauru and Manus Island have at times been "prison like", with asylum seekers not being allowed out of the compound.<sup>190</sup> Both RPCs have currently been converted to "open centres" and the asylum seekers are now able to come and go from their compounds, and security has been relaxed.<sup>191</sup> However, as the full court in *M68/2015* identified, the RPCs have changed from open to closed multiple times over the past four years, and asylum seekers could in the future be restricted again to their compounds.<sup>192</sup> Asylum seekers still remain unable to leave the small islands on which they have been placed as even those who have been found to be "refugees" have not been given documents which would enable them to travel.<sup>193</sup>

As discussed above, while the majority of the High Court of Australia held that detention in Nauru is at the prerogative of the Nauruan government, this domestic decision will not lessen Australia's international responsibilities under the ICCPR.<sup>194</sup> It is likely that Australia will be found to have sufficient control over the asylum seekers' detention in the case of each of the two centres for Australia to be considered to have engaged in arbitrary detention in both cases. As Ben Saul has stated, Australia has simply exported its own regime of mandatory immigration detention to Nauru, which has become "an Australian satellite, a quasi-dependency acting under the close control of Australia."<sup>195</sup>

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<sup>189</sup> ICCPR, above n 139, art 9(1).

<sup>190</sup> Claire Henderson, above n 26, at 1171.

<sup>191</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*, above n 65, at [19].

<sup>192</sup> *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*, above n 65, at [19].

<sup>193</sup> Madeleine Gleeson *Offshore*, above n 114, at 344.

<sup>194</sup> Law Council of Australia "Submission to the Senate Legal and Constitutional Affairs References Committee on the Condition and treatment of asylum seekers and refugees at the regional processing centres of the Republic of Nauru and PNG" (17 March 2016); UNHCR *Detaining asylum seekers and refugees in offshore detention centres subject to international obligations, despite High Court decision* (5 February 2016).

<sup>195</sup> Ben Saul "Constitutional Crisis: Australia's dirty fingerprints are all over Nauru's system" *The Guardian* (online ed, 21 January 2014).

Further while only single males were processed on Manus Island, children are still detained, and waiting to be processed alongside their families in Nauru.<sup>196</sup> This was a deliberate part of the policy implemented by the Australian government, as it was felt that sending children to be processed offshore alongside their families would dissuade families from making the journey.<sup>197</sup> The government did not want to give people smugglers information that would make children the ticket to resettlement. While as an abstract argument this policy decision may appear sound, the reality of life for children in the Nauru RPC is decidedly harsh and repressive. As at 3 April 2016, there were 50 children in the Nauru RPC. Article 37 of the CRC holds that a state is obliged to ensure that no child shall be subject to cruel, inhuman or degrading treatment, or kept in arbitrary detention, and that if the child is deprived of liberty, it is only at a last resort.<sup>198</sup> Under Article 37 the children detained are likely to have been deprived of their liberty. The children are kept in close quarters and in highly stressful situations, often with parents and other adults whose mental states have been affected by the journey itself and the long wait period.<sup>199</sup> Children in the RPC have been reported showing signs of depression and displaying age-inappropriate sexualised behaviour.<sup>200</sup> There are also reports of children having attempted suicide and having self-harmed. Many former workers have spoken out on behalf of the children, holding that their detention is damaging and detrimental, and will have ongoing effects for those who have been held in the processing centres.<sup>201</sup>

## 5 Concluding the extraterritorial capabilities of human rights abuses

Actions in the RPCs, as well as the mandatory detention of asylum seekers, amount to breaches of international human rights law. Extraterritorial processing and state responsibility may be two avenues under which Australia could be considered to retain international responsibility for human rights abuses in the RPCs. In regards to these two “tests” Gammeltoft-Hansen holds that:<sup>202</sup>

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<sup>196</sup> Azadeh Dastyari, above n 23, at 672.

<sup>197</sup> Australian Government *Report of the Expert Panel*, above n 52, at 130.

<sup>198</sup> Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 37.

<sup>199</sup> Madeleine Gleeson *Offshore*, above n 114, at 54.

<sup>200</sup> Madeleine Gleeson *Offshore*, above n 114, at 312. “A four-year-old girl began ‘exhibiting behaviours consistent with a child who had been sexually assaulted’, including trying to get adults to insert their fingers into her anus, playing with dolls in a sexualised way, and dancing in a sexual manner that was inappropriate for her level of development.”

<sup>201</sup> This is in spite of legislation preventing whistle-blowers. See: Editorial “‘This is critical’: 103 Nauru and Manus staff speak out – their letter in full” *The Guardian* (online ed, Australia, 17 August 2016).

<sup>202</sup> Gammeltoft-Hansen, above n 132, at 77.

Jurisdiction is neither taken as a given or necessarily linked to the question of state responsibility – instead it is used as a separate test in which the conflicting basis for territorial jurisdiction has to be overcome in order for... extraterritorial jurisdiction to materialise.

It is submitted that Australia retains sufficient “effective control” over both of the RPCs for their human rights obligations to be extended, and that, failing this, the doctrine of international state responsibility may hold Australia accountable for either aiding and abetting Nauru and Papua New Guinea in human rights abuses, or, the attribution of actions of actors in the RPCs to Australia.

## 6 *The extraterritorial application of the Refugee Convention*

Other than the concept of non-refoulement, rights under the Refugee Convention are not granted en bloc; rather, the closer the relationship between the refugee and the host nation becomes, the more rights are afforded to the refugee.<sup>203</sup> This reflects the concern of the drafters that participating states would not be inundated by asylum seekers that they would be forced to protect under to the full extent of the Convention in mass influx situations.<sup>204</sup> Therefore, the economic and social rights attached to the Refugee Convention are only afforded to an asylum seeker when the refugee is “lawfully staying” in the host country.<sup>205</sup>

There are marked differences between the application and territoriality of human rights law and refugee law. While, as discussed above, most human rights obligations can be extended beyond the vertical relationship between citizen and state in a state’s territory, it is arguable that the jurisdictional requirements in the Refugee Convention are more tethered to a traditional conception of territoriality.<sup>206</sup> The Refugee Convention contains an abundance of rights for the declared refugee; however, the majority of those in the Nauru and Papua New Guinea RPCs are not declared refugees, but are awaiting “processing”. It is submitted that the only obligation Australia has to asylum seekers held in the Nauru and Papua New Guinea RPCs is the continued obligation of non-refoulement. The opinion of the UNHCR is that it is relatively settled under both regional and international law that the concept of non-refoulement extends extraterritorially.<sup>207</sup> It maintains that limiting the territorial scope of the application of

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<sup>203</sup> Gammeltoft-Hansen, above n 132, at 58.

<sup>204</sup> Guy S. Goodwin-Gill “The Continuing Relevance of International Refugee Law in a Globalized World” (2015) 10 Intercultural Hum Rts L Rev 25 at 28.

<sup>205</sup> Convention Relating to the Status of Refugee, above n 77, art 15, 17, 18, 19, 21, 23, 24, 26, and 28.

<sup>206</sup> Gammeltoft-Hansen, above n 132, at 58.

<sup>207</sup> UNHCR *Advisory Opinion on the Extraterritorial Application of Non-Refoulement*, above n 98 at 12.

non-refoulement to the conduct of a state within its national territory would be “at variance” with subsequent state practice and the relevant rules of international law applicable between the states party to the treaty.<sup>208</sup>

As established above, Australia is likely to be considered to be exercising effective control over the Nauru and Papua New Guinea RPCs. As such, their obligations to not return or *refouler* asylum seekers to situations where they may be at risk of persecution is still engaged. In this it is submitted here that Australia may be committing effective refoulement, in which the asylum seeker is encouraged, or feels like there is no alternative but to, return to their home country where they will return to persecution.<sup>209</sup> The prolonged detention in the RPCs with a lack of a decision as to their status has forced many refugees to returning to their home nations.<sup>210</sup> It is noted that a majority of these asylum seekers are likely to be considered refugees under the Refugee Convention.<sup>211</sup> Recently, it has been reported that due to the impending closure of Manus Island, asylum seekers and declared refugees have been told that they will have to be resettled in Papua New Guinea, or return home.<sup>212</sup> Australia’s participation in placing asylum seekers in situations in which they feel that they have no option but to return to countries where they face persecution is undoubtedly to be a breach its non-refoulement obligations under the Refugee Convention.

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<sup>208</sup> UNHCR *Advisory Opinion on the Extraterritorial Application of Non-Refoulement*, above n 98, at 15.

<sup>209</sup> Ben Doherty “‘It’s simply coercion’: Manus Island, Immigration policy and the men with no future” *The Guardian* (online ed, Australia, 28 September 2016).

<sup>210</sup> Elibritt Karlsen, above n 22, at 8.

<sup>211</sup> See above at n 90 for discussion of percentage of boat people found to be refugees.

<sup>212</sup> Ben Doherty “‘It’s simply coercion’: Manus Island, Immigration policy and the men with no future” *The Guardian* (online ed, Australia, 28 September 2016).

### III Consequences of Australia's Breaches of International Law

*"So let me be clear. Anyone who attempts to come to Australia by boat will never be settled here permanently. No one on Manus Island or Nauru will ever be settled in Australia."*

Peter Dutton, 21 September, 2016<sup>213</sup>

#### *A Paper Tigers: A solution under international law*

There are various international mechanisms in human rights law which have been established to hold countries accountable for breaching or denying their responsibilities. There are ten UN treaty bodies that are comprised of independent experts that monitor the implementation of the core international human rights treaties, of which six of the bodies have the capacity to receive individual complaints.<sup>214</sup> As a state party to the Optional Protocol of the ICCPR, Australia has voluntarily recognised the competence of the UN Human Rights Committee to receive and consider complaints from individual subjects within Australia's jurisdiction who claim to have had their rights under the ICCPR violated by Australia.<sup>215</sup> States are expected to treat the Committee's decisions regarding these complaints as authoritative determinations concerning the implementation of the ICCPR and to respect and to implement them in good faith. However, Australia has a history of roundly ignoring the recommendations and reports of such human rights tribunals.<sup>216</sup>

Further, some commentators have argued that Australia's actions in Nauru and Papua New Guinea might be akin to a crime against humanity which attracts individual criminal responsibility. Individuals may be personally and criminally responsible for certain acts that constitute such crimes under international law, even if they are acting on behalf of or on the instructions of the state in carrying out the crimes. For instance, Claire Henderson has argued that Australia's actions in detaining asylum seekers and delaying processing their refugee claims may be a crime against humanity under the International Criminal Court (ICC) Rome Statute.<sup>217</sup> In October 2014, MP Andrew Wilkie wrote to the ICC prosecutor in The Hague requesting an investigation into and prosecution of then-Prime Minister of Australia Tony Abbott, and 19 of his cabinet ministers, in relation to the mistreatment of asylum seekers in offshore processing

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<sup>213</sup> Peter Dutton "Address to the Australian Strategic Policy Institute, Canberra" (Australian Strategic Policy Institute, Canberra, 15 September 2016).

<sup>214</sup> Madeleine Gleeson "Factsheet: Offshore Processing", above n 68 at 14.

<sup>215</sup> Madeleine Gleeson "Factsheet: Offshore Processing", above n 68, at 14.

<sup>216</sup> Letter from Ben Saul (Professor of International Law at the University of Sydney) to United Nations Human Rights Committee regarding Australia's Response to the Committee's Views in Communication Nos. 2094/2011 and 2136/2012 (4 March 2014) at 3.

<sup>217</sup> Claire Henderson, above n 26, at 1163.

centres.<sup>218</sup> It remains to be seen whether the ICC will pursue any action. It is likely that Australia's offshore processing of refugees would not meet the required level of gravity needed under the ICC Statute for the Prosecutor to decide to initiate an investigation.<sup>219</sup>

An alternate route that could lead to the closure of detention centres would be via a domestic action in Nauru. The April 2016 Papua New Guinea Supreme Court case means that, with the support of the Papua New Guinea government, the centre is on its way to being permanently closed. However, in April, and at the time of writing in October, the centre still housed 877 males. Nevertheless, similar proceedings could be launched in Nauru to achieve a similar result. Like Papua New Guinea, Nauru has a Constitution that protects the right of personal liberty.<sup>220</sup> As in the Papua New Guinea Supreme Court case, the Nauru Court could decide to close the courts on constitutional grounds if proceedings were launched. Realistically, this is highly unlikely to happen. Nauru is a completely impoverished island nation.<sup>221</sup> The Nauruan government relies heavily on Australia for needed aid, and the RPC provides consistent and stable jobs to an otherwise destitute population.<sup>222</sup> While public sentiment in Nauru can be anti-refugee, it is acknowledged that the RPC is needed there to provide the funds and support that the island needs to continue to survive. It is therefore submitted that it is highly unlikely that Nauru would consider the closure of the centre on the island, and the change would need to come from Australia itself. Dutton has gone some way to confirm this, stating in a speech of 21 September 2016 in regards to Nauru that “[Australia's] relationship in this regard will continue for decades”.<sup>223</sup>

While it can be concluded that Australia's policy of offshore processing creates real risks of violations of multiple international obligations, including non-refoulement obligations, obligations to not penalise refugees for illegal entry, arbitrary deprivation of liberty and unjustified restrictions of movement, and cruel, inhuman or degrading treatment, the international legal mechanisms in place to hold Australia responsible are likely to be only hypothetical. There is no international refugee court, and Nauru, Papua

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<sup>218</sup> Letter from Andrew Wilkie (MP for Denison) to the Prosecutor of the International Criminal Court, regarding the prosecution of Tony Abbot for Crimes Against Humanity (22 October 2014) at 1.

<sup>219</sup> Claire Henderson, above n 26, 1181.

<sup>220</sup> Constitution of Nauru 1968 (Nauru), art 5.

<sup>221</sup> The history of Nauru is a history of failed independence. Once the richest nation in the world per capita due to phosphate found in the soil in Nauru, Nauru is now destitute. A corrupt government squandered the money the Island had made from the phosphate trade. In the 1990s, the education, government and court system crashed. Nauru, which as of 2016 had a population of 10,306, is completely reliant both on the Nauru RPC and the Australian government for survival. See: Ben Doherty “A short history of Nauru, Australia's dumping ground for refugees” *The Guardian* (online ed, Sydney, 9 August 2016).

<sup>222</sup> Ben Doherty “A short history of Nauru, Australia's dumping ground for refugees” *The Guardian* (online ed, Sydney, 9 August 2016).

<sup>223</sup> Peter Dutton “Address to the Australian Strategic Policy Institute, Canberra” (Australian Strategic Policy Institute, Canberra, 15 September 2016).

New Guinea and Australia have all at various times denied responsibility to what is happening in the RPCs.

*B The Road to Substantive Change: A community based approach*

The political background to Australia's implementation of offshore processing is complex. Established above, it is likely that Australia would be found to have sufficient control to retain obligations to those sent overseas, however, Australia's actions in the Nauru and Papua New Guinea RPCs are protected domestically by legislation and support in Parliament. Although internationally condemned, Australia's many human rights abuses are unlikely to be prosecuted in any international court.

What would be most effective in producing substantive change to Australia's policy would be a systematic change in public opinion. Greater knowledge of what life is like for asylum seekers in these overseas centres, the amount of money the Australian government spends in maintaining the centres, and what is being done in the name of the Australian public could shift public sentiment to the extent that the government is forced to abandon the policy. Exposés such as *The Guardian's* Nauru Files go a long way towards educating and directing public sentiment.<sup>224</sup> There is a highly plausible argument, however, that a majority of Australian society agrees, perhaps not with the tactics used by Parliament, but rather with the policy in general, seeing asylum seekers who arrive by boat as illegally entering Australian territory.<sup>225</sup> Change to Australian policies, and therefore a remedy for asylum seekers held in such deplorable conditions, must come from within Australia's society.

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<sup>224</sup> Editorial "The Nauru Files", above n 7.

<sup>225</sup> See for example: Dennis Shanahan "Australia can't go soft on offshore processing of asylum-seekers" *The Australian* (online ed, Australia, February 6 2016) "Hard and harsh as it is, the Coalition government and the Labor opposition must stick with the deterrent policy of offshore processing and deny access to Australia for those seeking to enter illegally and then use the legal system to stay to the bitter end", and Paul Donoghue "Election 2016: 10 things Vote Compass reveals about voter's views on immigration" *ABC News* (online ed, Australia, 9 June 2016). The Vote Compass article reveals that 49% of people interviewed agreed with boat turnbacks, and 42% agreed with offshore detention centres. There was a clear partisan divide and generational gap between those who answered.

## IV Making Asylum Illegal: The Place of the Asylum Seeker in International Law

*“Sovereign is he that decides on the exception”*

Carl Schmitt<sup>226</sup>

### *A The Refugee Convention: A failure in cooperation*

The impact of Australia’s policy of offshore processing becomes apparent when its effect is considered globally. In an era of greater globalisation, international refugee law as it was first conceptualised is struggling to retain its relevance. For the drafters who composed the Refugee Convention at the close of World War II and in the early days of the Cold War, it would have been difficult to anticipate the extent to which the individual refugee would come to be accepted as a rights-holder, a person entitled to international protection in the international arena.<sup>227</sup> The Refugee Convention was drafted on the idea of cooperation between states, where one state failed their citizen, a subsequent state would step in. However, it is relevant to note that the Refugee Convention was drafted by Western states from a Eurocentric point of view. The refugee burden falls heavily on developing states who share a border with violent hot spots. This Western point of view has had an impact on the subsequent application and interpretation of the Convention. As result, the global community is still trying to find ways to make “real and concrete” this critical point of cooperation within the Refugee Convention.<sup>228</sup>

As there are more displaced people on the move in the world than ever before, there is increased pressure on governments in “desirable” Western nations to develop solutions that are equal parts humane and continue to advance policies that protect the interests of their constituents. Often this is a balancing exercise, and one that is heavily weighted on the side of domestic political concerns. Policy compromises are developed which lead to imaginative “solutions” to “refugee crises” such as offshore processing. A worldwide trend towards a rejection of the greater multilateralism that comes with enhanced globalism has led many countries to elect, or consider electing, leaders that

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<sup>226</sup> Carl Schmitt *Political theology: four chapters on the concept of sovereignty* (Chicago: University of Chicago Press, 2005) at 81. Carl Schmitt was a famous political theorist and philosopher. By “exception” he meant the appropriate moment for stepping out of the rule of law in the public interest. It is arguable here that this is what various governments globally, including the Australian government, is doing, as they circumvent established international principles in the name of sovereignty, public interest, and security.

<sup>227</sup> Guy S. Goodwin-Gill “The Continuing Relevance of International Refugee Law in a Globalized World” (2015) 10 *Intercultural Hum Rts L Rev* 25 at 28.

<sup>228</sup> Guy S. Goodwin-Gill “The Continuing Relevance of International Refugee Law in a Globalized World”, above n 227, at 27.

have campaigned on nationalistic stances. This has often included the rejection of immigration for a return to a more traditional conceptualisation of sovereignty and border control. Recent examples include the ugly immigration discussion that underpinned Brexit, and Donald Trump’s repeated assertions that he will “build a wall”, both of which have led, or are leading to substantive changes in immigration policy at a national level.<sup>229</sup> Underneath this, the rise of ISIS, fear of terrorism in the West, and the European “migrant crisis” has fuelled discussion of the place, and the rights, of the asylum seeker in the international arena.

The characterisation of the asylum seeker as “illegal” is nothing new in global politics. Since 9/11, asylum seeker policy has been subsumed by national security concerns.<sup>230</sup> This rhetoric and policy has blended into the implementation of refugee programmes that deter and reject rather than support and acknowledge the serious persecution that many of those seeking protection are fleeing from. The UN General Assembly’s 1994 Declaration on Measures to Eliminate Terrorism included a reference to the obligations of states to “take appropriate measures before granting asylum for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities, and, after granting asylum for the purpose of ensuring that the refugee status is not used for terrorism related activity”.<sup>231</sup> Further, in 2006, the UN Security Council implied a direct connection between terrorism and refugees. It should be noted that it remains unlikely that the would be terrorist would choose the asylum route as his or her target.<sup>232</sup> However, in the wake of the Paris Attacks and the Cologne sexual assaults, states are more cautious than ever, and are talking increasingly restrictive approaches.

### *B The Extraterritorialisation of Refugee Control: out of sight, out of mind?*

Extraterritorial processing schemes are designed to prevent and deter access to statutory and judicial asylum safeguards in the country responsible for the interception and transfer of asylum seekers to another country. Sceptics argue that the centres are designed to be deliberately isolated from the national and institutional protections within either the intercepting state, or the country where the processing occurs.

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<sup>229</sup> Amy Davidson “Brexit Should be a Warning About Donald Trump” *The New Yorker* (online ed, New York, June 24 2016). The article quotes Donald Trump drawing parallels between his campaign and Brexit ““People want to take their country back,” he said. “They want to take their borders back. They want to take their monetary back. They want to take a lot of things back.” Most of all, perhaps, “they don’t necessarily want people pouring into their country.””

<sup>230</sup> Rebecca Hamlin *Let Me Be a Refugee: Administrative justice and the politics of asylum in the United States, Canada and Australia* (Oxford, Oxford University Press, 2013) at 32.

<sup>231</sup> Guy S. Goodwin-Gill “The Continuing Relevance of International Refugee Law in a Globalized World”, above n 227, at 32.

<sup>232</sup> Guy S. Goodwin-Gill “The Continuing Relevance of International Refugee Law in a Globalized World”, above n 227, at 32.

Proponents of the policy argue that it is one way to protect national security. Offshore processing is one facet to extraterritorial processing – other examples include the excision of territory, either at border controls or by demarcating non-migration zones, and boat turn backs on the high seas. When Australia disbanded the original Pacific Solution in 2008, it was because the government found that the processing centres in Nauru and Papua New Guinea were unworkable, as actions overseas towards asylum seekers negated national safeguards fundamental to the satisfaction of Australia’s international obligations.<sup>233</sup> Yet the resurgence of this policy three years later, links back to wider questions about the relevance of the Refugee Convention in an era where states are abrogating their convention responsibilities towards asylum seekers who arrive by irregular methods. It raises the question – to what extent does the extraterritorialisation of asylum seeker processing affect the processes put in place to protect the asylum seeker, and what does the continued use of such deterrence policies mean going forward?

There is no denying that extraterritorial processing has generally been of particular interest to governments that are seeking to limit the number of migrants and asylum seekers arriving at their borders. Offshore processing relies on another state to house and process the asylum seeker before those that are accepted move on to their new nation state. Military boat interceptions and push-backs usually send the boat back to the country from which the boat departed. In both scenarios the role that the “desirable” nation plays are problematic, as the country in which the asylum seeker either departed from or will be housed are more than likely to have less favourable asylum reception and processing capacities.

Australia’s use of Nauru and Papua New Guinea in its forced detention scheme is the most extreme example of offshore processing globally. However, other nations have similar policies, or are looking to Australia as an example of what to do. Canada, the United States and the EU all have deterrence and asylum detention policies, which suggests that they are also reluctant acceptors of their status as countries of first asylum.<sup>234</sup> In the EU, countries have been looking to Australia as an example of how best to manage the flow of potential asylum seekers. In November 2014, the German Interior Minister Thomas de Maiziere floated the idea of “welcome and departure centres” in major transit countries in North Africa, where applications for asylum would be processed.<sup>235</sup> With the obvious benefits for Germany of processing asylum seekers offshore put aside; de Maiziere’s policy could be considered to have a humanitarian

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<sup>233</sup> Angus Francis, above n 69, at 275.

<sup>234</sup> Rebecca Hamlin, above at n 230, ch 3.

<sup>235</sup> Sarah Léonard and Christian Kaunert “The extraterritorial processing of asylum claims” (2016) 52 FMR.

undertone. By allowing the application for asylum to be processed in centres accessible for people fleeing violent hot spots, it would remove the obligation to be on European soil in order to apply for asylum, and the external processing of asylum claims would deter asylum seekers from embarking on perilous and costly journeys across the Mediterranean to Europe.<sup>236</sup> While this policy was never implemented, similar rhetoric has been adopted recently in the wake 2015, which saw record numbers of asylum seekers crossing into the EU from the Middle East by either landing by boat in Greek Islands, or crossing by land from Turkey.

These extraterritorial policies of deterrence and rejection have been widely criticised by humanitarian bodies which advocate on behalf of the asylum seeker. The concept of the “asylum seeker” and the “refugee” have been separated in the humanitarian narrative<sup>237</sup> – while a refugee is someone who is seen as worthy of protection, an asylum seeker is given labels such as “illegal” “sham refugee” and “economic migrant”, and is widely perceived as a security threat.<sup>238</sup> Even the UNHCR has conceded to a discourse of securitisation because it believes that it must “relate to these asylum fears and the language of security enveloping them” in order to remain relevant to donor states.<sup>239</sup> It is in this that the inherent tension prevalent in the asylum seeker debate remains: while international bodies are attempting to retain the concept of asylum seeker rights through maintaining the concept of state responsibility, states are seeking to mitigate these duties.

### *C International Human Rights and Refugee Law: mixed solutions*

Under human rights law, as discussed throughout this paper, when a state extends its migration control operations to the territories of third states, it is difficult to determine whether this also ends the state’s legal responsibility. While the territoriality principle would shift the legal obligations to the third state, human rights law seeks to avoid a legal gap that would work to the detriment of the individuals concerned.<sup>240</sup> This is especially the case as the utilised second country is usually a nation which has neither the wealth nor the resources to effectively protect the asylum seeker; this is certainly the case with Nauru and Papua New Guinea, or even the African states proposed by de Maiziere. The solution to this conflict may be application of a test of “effective control”,

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<sup>236</sup> Sarah Léonard and Christian Kaunert “The extraterritorial processing of asylum claims”, above n 233.

<sup>237</sup> Rebecca Hamlin, above n 230, at 32.

<sup>238</sup> For examples of this kind of language see: Rebecca Hamlin, above n 230 at 60; Janet Phillips, above n 84 at 1; Jane McAdam and Fiona Chong, above, n 81 at ch 1.

<sup>239</sup> Rebecca Hamlin, above n 230, at 60.

<sup>240</sup> Tom De Boer “Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection” (2014) 28 Intl J Refugee L 118 at 125.

which serves as the extension of the usual territorial-based principle of state responsibility. This functional reading of the concept of jurisdiction prevents the creation of a legal black hole in which states have the power to be able abuse human rights in nations in which they are not sovereign. Yet, the treaties and international courts remain “paper tigers”, and as such the protection of those who are perhaps society’s most vulnerable is becoming a legal lacuna.<sup>241</sup> Thomas Gammeltoft-Hansen has recognised that states are motivated to institute deterrence practices to “release themselves – de facto or de jure – from some of the constraints otherwise imposed by international law.” This premise is certainly true, especially in the case of Australia, where successive governments have gone to great lengths to move their asylum seeker obligations offshore.

Yet, the Refugee Convention is not a human rights treaty itself, and is unique in the span of treaties that relate to the implementation of human rights. The Refugee Convention relies on an attachment of an alien to a foreign state. While most human rights treaties rely on the vertical relationship between state and citizen, the Refugee Convention operates outside of this realm, making it less appropriate to an extraterritorial application.<sup>242</sup> While other human rights treaties can be extended somewhat to remedy this black hole, the incremental approach of attaching rights to the “legally staying” refugee may be stilted when the asylum seeker is processed away from the territory of the state that would owe protective obligations.<sup>243</sup> Under the original processes of the Refugee Convention, where an asylum seeker arrives at the border of a state, and is processed inside the state’s territory, there is a “natural progressive transition toward the entire catalogue of convention rights.”<sup>244</sup> Where this process occurs extraterritorially, progression of rights is uncertain, and refugees, while acknowledged, may find themselves unable to progress.<sup>245</sup>

One highly significant commonality of popular asylum seeker destinations is that they became parties to the international treaties which made commitments to refugee protection before they were considered the desirable, or even the accessible, nations that they are now.<sup>246</sup> Therefore, it is suggested that the rise of deterrence is partly a story of “unintended consequence”.<sup>247</sup> The leaders of today are hampered by commitments made by a past generation who did not have the foresight to understand the implications of their global humanitarian commitments. It has been suggested that perhaps, had these

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<sup>241</sup> Patrick Van Berlo, above n 30, at 37.

<sup>242</sup> Gammeltoft-Hansen, above n 132, at 56.

<sup>243</sup> Gammeltoft-Hansen, above n 132, at 58.

<sup>244</sup> Gammeltoft-Hansen, above n 132, at 63.

<sup>245</sup> Gammeltoft-Hansen, above n 132, at 63.

<sup>246</sup> Rebecca Hamlin, above n 230, at 33.

<sup>247</sup> Rebecca Hamlin, above n 230, at 33.

countries leader's anticipated the financial, security and political challenges of the present day asylum seeker debate, they would not have made the decision to ratify the treaties at a time in which the issues in discussion were largely an abstraction.<sup>248</sup>

This being said, no country has thus far threatened to abandon the Refugee Convention in its entirety.<sup>249</sup> On the other hand, no nation globally has been able to effectively prevent asylum seekers from arriving within its borders. It is this push and pull that determines the ongoing asylum seeker debate. It could be argued, especially when one considers the concept of offshore processing, that the international refugee protection regime is wearing thin, and the patience of countries of first asylum even thinner. As Rebecca Hamlin argues, in the decades that states could determine who and how many asylum seekers they resettled, and when they could come, states remained relatively faithful to their Convention obligations. It is "only now, when conforming to refugee protection commitments has become inconvenient and expensive, is the regime truly being put to the test."<sup>250</sup>

#### *D Globalisation and the Asylum Seeker: a possible future*

So, where to from here? The question has been posed by many, each with a differing response. There is, perhaps, no one solution. The question in itself is multifaceted. Politics and policy concerns are likely to be given the greatest weight by those who are faced with making the decision. Under the current legal framework, for every asylum seeker who is granted protection and offered resettlement, there are a thousand others, even a million others, that are waiting for a similar chance. While the regional and international courts are tilling novel ground in extending the human rights obligations of a state beyond a traditional border, and attempting to hold states responsible for their actions, the courts themselves, especially within the current legal framework attached to the Refugee Convention, can only go so far.

It is possibly a fair argument to say that concepts such as offshore processing are undermining and circumventing international norms which in turn nullifies the ability of the Refugee Convention, as it currently stands, to protect those left vulnerable. If offshore processing means that refugee protection and processing is to be moved away from the Western nations which are best equipped, both financially and politically, to handle such situations, there must be a greater adherence to the international framework already in place to protect those from being mired in situations possibly worse than those that they had left. Alternatively, states must seek to amend and adapt the policy

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<sup>248</sup> Rebecca Hamlin, above n 230, at 33.

<sup>249</sup> Catherine Dauvergne, above n 12, at 60.

<sup>250</sup> Rebecca Hamlin, above n 230, at 60.

of the Refugee Convention to reflect the 21<sup>st</sup> century and the problems of today, as opposed to those that were considered at the end of the Second World War, before the widespread effects of globalisation and its concurrent problems.

## Conclusion

*For those who've come across the seas  
We've boundless plains to share;  
With courage let us all combine  
To Advance Australia Fair.<sup>251</sup>*

There is a strong argument, based in international law, that Australia retains responsibility towards the asylum seekers they send to Nauru and Papua New Guinea. Regional and international courts began to extend the definition of jurisdiction, in regards to international human rights treaties, which has in turn led many to conclude that human rights obligations will apply wherever a state exercises “effective control”. Extraterritoriality has become an important way of circumventing sovereignty, and assigning fault for human rights abuses that occur outside of a traditional state border.

If Australia is found to be responsible for the asylum seekers in the Nauru and Manus Island RPCs, there are a whole host of important human rights that Australia is likely to have breached. The most significant of these is the right to be free from arbitrary detention. It is under this right, entrenched in the Papua New Guinea Convention, that the Manus Island RPC has been closed.

However, the Nauru RPC is far from being closed, and for the over 1,000 asylum seekers still held across the two RPCs, their future looks bleak. While it is possible to establish that Australia does have international obligations towards these asylum seekers and refugees, no international court or multinational has been able to hold the Australian government to account, and the Australian High Court has implicitly agreed to the continuation of such policies in the *M68/2015* judgment.

It is perhaps a sad case study that the international framework currently in place has failed to hold Australia accountable for the significant human rights abuses that accompany offshore processing. The discussion of offshore processing takes place in a wider setting which highlights increasing changes of the international refugee system. Globalisation, a nationalistic backlash and the importance of national security in the post 9/11 world, all play a part in establishing that Western states of first asylum are becoming increasingly reticent to take a leading humanitarian role in accepting asylum seekers. While no nation has rejected the Refugee Convention outright, some Western nations are employing strategies of deterrence, with their borders becoming militarised zones. Australia’s development of offshore processing may be the most extreme

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<sup>251</sup> Peter Dodds McCormick “Advance Australia Fair” Australian National Anthem (1878)

example of nations pushing their obligations out of their territory, but further, more subtle changes in the EU and the United States show that this is a global, rather than just Pacific, phenomenon.

In 2015, Australia announced a bid for a seat on the United Nations Human Rights Council, with then Foreign Minister Julie Bishop stated that “Australia is committed to a better world”.<sup>252</sup> The bid is still ongoing. It has to be asked whether the asylum seekers in Nauru and Papua New Guinea are to belong to this “better world”. The current policy of the Australian government, of placing asylum seekers offshore and hoping that they remain out of sight and therefore out of mind, is slowly failing. The collapse of RPCs in Nauru and well as in Papua New Guinea would be to the benefit of Australia’s human rights policy, and for the protection of displaced persons seeking asylum on Australian shores. One can only watch to see what will happen next. Let us hope that future governments of Australia aim to “Advance Australia Fair” by providing a safer harbour “for those who’ve come across the seas”.

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<sup>252</sup> Dennis Altman “A more humane Australian foreign policy” (25 June 2016) Right Now <<http://rightnow.org.au>>

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*Appendix 1: Map of Nauru, Papua New Guinea and Australia.*



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*Appendix 2: Timeline of Australia’s offshore processing policy.*

<b>Date</b>	<b>Event<sup>253</sup></b>
1996 - 2007	John Howard (Liberal Coalition) Prime Minister of Australia. <sup>254</sup>
August 2001	Tampa Affair.
2001-2008	Original Pacific Solution in operation.
2007 - 2010	Kevin Rudd (Labor) - Prime Minister of Australia.
2010 - 2013	Julia Gillard (Labor) - Prime Minister of Australia.
7 May 2011	Malaysian Solution - The Australian Government announces an arrangement with the Malaysian Government whereby 800 asylum seekers who arrived by boat in Australia would be transferred to Malaysia.
25 July 2011	Transfer arrangement between Australia and Malaysia formally signed.
31 August 2011	High Court of Australia rules that Australia’s transfer arrangement with Malaysia could not proceed due to the absence of legal protections for refugees and asylum seekers in Malaysia.
28 July 2012	Following the sinking of several boats en route to Australia and the resulting deaths of dozens of asylum seekers, Prime Minister Julia Gillard appoints an Expert Panel to “provide a report on the best way forward to prevent asylum seekers risking their lives on dangerous boat journeys to Australia.”
13 August 2012	The Expert Panels releases its report. Contains 22 amendments including; working towards the development of a cooperative regional framework for improvising protection and asylum system, reintroducing offshore processing of asylum seekers in Nauru and

<sup>253</sup> Unless specified, the majority of the timeline is adapted from - Refugee Council of Australia “Timeline of major events in the history of Australia’s Refugee and Humanitarian Program” (Last updated May 11, 2016).

<sup>254</sup> List of Australia’s Prime Ministers adapted from .“Australia’s Prime Ministers” (accessed August 2016) Australian Government and National Archives of Australia <[www.primeministers.naa.gov.au](http://www.primeministers.naa.gov.au)>.

	Papua New Guinea. Central to this report was the ‘no advantage test’.
14 August 2012	Australian government introduces legislation to allow offshore processing of asylum seekers in Nauru and Papua New Guinea. Passed by both Houses of Parliament and became law on the 17 <sup>th</sup> of August.
14 September 2012	Australia begins transferring asylum seekers to the re-established offshore processing centre in Nauru.
21 November 2012	Australia begins transferring asylum seekers to the re-established offshore processing centre on Papua New Guinea’s Manus Island.
27 June 2013 – 18 September 2013	Kevin Rudd (Labor) Prime Minister of Australia.
19 July 2013	Prime Minister Kevin Rudd announced a new “Regional Resettlement Arrangement” with Papua New Guinea. All asylum seekers arriving in Australia by boat from 19 July onwards would be transferred to Papua New Guinea, and if they are found to be refugees, face permanent resettlement in Papua New Guinea.
19 July 2013	Riot breaks out in Nauru. Several buildings are destroyed and over 100 people arrested.
3 August 2013	The Australian Government signed a new memorandum of understanding with Nauru similar to its Regional Resettlement Arrangement with Papua New Guinea. Asylum seekers who are transferred to Nauru for processing and found to be refugees could be settled in Nauru permanently, although this has still not occurred.
18 September 2013 - 2015	Tony Abbott (Liberal Coalition) Prime Minister of Australia.
18 September 2013	Operation Sovereign Borders (OSB) commences.
17 February 2014	Violent riot on Manus Island, resulting in the death of Reza Berati. Over 60 others were injured.

26 September 2014	Australian and Cambodian Government signed a deal under which people on Nauru are found to be refugees are resettled in Cambodia.
18 November 2014	Asylum seekers registered with UNHCR in Indonesia after 1 July 2014 will no longer be resettled in Australia.
1 July 2015	Australian Border Force Act takes effect on 1 July 2015.
15 September 2015 - Incumbent	Malcolm Turnbull (Liberal Coalition) Prime Minister of Australia.
5 October 2015	Nauruan Government announced that the RPC would operate under an open centre arrangement.
3 February 2016	<i>M68/2015 v Minister for Immigration</i> – High Court dismisses a challenge to the legality of offshore processing regime. Government’s legal victory rested on a retrospective amendment to the Migration Act.
15 April 2016	A refugee in Nauru was convicted of attempted suicide, which was recognised as a crime in Nauru at the time. The conviction followed an incident in January where he tried to take his own life.
26 April 2016	Papua New Guinea’s Supreme Court ruled that the transfer and detention of asylum seekers on Manus Island are both illegal and breach of the right to personal liberty in the Papua New Guinea constitution.
26 April 2016	Omid Masoumali (refugee who had been living on Nauru for three years) set himself on fire and died.
2 May 2016	Hamid (a 19-year-old Somali refugee living in Nauru) set herself on fire. She has thus far survived her injuries.
August 2016	Peter Dutton, Minister for Immigration, confirms that Manus Island RPC will be shut. <sup>255</sup>

<sup>255</sup> Nicole Hasham “Manus detention centre: PNG announces Australia has agreed to close centre” *The Sydney Morning Herald* (online ed, Australia, August 17 2016).

12 August 2016	<i>The Guardian</i> publishes ‘The Nauru Files’ detailing the systematic abuse and neglect of the asylum seekers held in detention in the Nauru RPC. <sup>256</sup>
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<sup>256</sup> Editorial “The Nauru Files”, above n 7.