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## Introduction

Since 13 August 2012, asylum seekers who have arrived in Australia by boat (or who have been intercepted at sea and brought to Australia) without a valid visa have been subject to



## What conduct is 'attributable' to Australia?

### Attribution generally

people, organs and entities acting on their behalf. International law contains clear rules to determine which conduct can and cannot be attributed to a State. Conduct which may be attributed to a State generally includes:

- < conduct by any legislative, executive, judicial or other organ of the State, including the government, Parliament, individual Ministers, government departments and courts;
- < conduct by ain powers relating  
to immigration, border control, arrest and detention); and
- < other persons and entities who are acting on the instructions of, or under the direction or control of, the State in carrying out the conduct.<sup>4</sup>

For the purposes of attribution it is irrelevant whether the person, organ or entity is acting within

### Attribution of conduct affecting asylum seekers and refugees offshore

The conduct of the Australian Home Affairs

- ◁ the content and manner of delivery of messages and information to asylum seekers in Nauru and PNG, to the extent that it is determined or carried out by people acting on behalf of the Australian government;
- ◁ the choice of private contractors and oversight of their work; and
- ◁ all other operational and management decisions, to the extent that they are carried out by people acting on behalf of the Australian government.

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

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

Conduct that is attributable to Australia lity under international law if it violates an international legal obligation by which Australia is bound.

### Identifying the legal obligations

As a responsible member of the international community and an active participant in international law processes, Australia has voluntarily assumed a range of human rights obligations under international treaties. In particular, Australia is a party to and legally bound by the 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol, and all the major human rights treaties.<sup>6</sup>

Since 2012, the offshore processing arrangements have been plagued by extensive and ongoing reports of significant violations of human rights.<sup>7</sup> These reports indicate that any State with obligations to respect and protect the rights of people subject to these arrangements is likely to have breached those obligations. As discussed [below](#), more than one State may have obligations towards these individuals under international law at the same time, and therefore more than one State may be responsible for any violations.

The critical question for present purposes is whether *Australia* is one such State, even though the people concerned are outside Australian territory. The following sections answer this question and explain why Australia is likely to have obligations both before and after the removal of people from Australian territory.

## Obligations relevant to the decision to remove asylum seekers from Australia



family back to Italy without first receiving guarantees from the Italian authorities that the family would be kept together in conditions appropriate to the ages of the children.<sup>17</sup> Absent these guarantees, no removal could take place. It is arguable that a similar prohibition on the removal of families with children could or should have been applied in relevant cases of transfer from Australia.

(ii) *Refoulement* to the risk of persecution

*non-refoulement*

obligations as a result of the risk of persecution in Nauru or PNG. For example, there are reports that homosexual and Muslim asylum seekers may face persecution in PNG on the basis of their sexuality or religion.<sup>18</sup> The likelihood of such persecution should have been assessed in each individual case, with any asylum seeker found to be at risk exempted from removal offshore.





- ◁ in the case of *Medvedyev*, the European Court of Human Rights held that France had jurisdiction over the crew members detained on board a ship which French authorities intercepted and took control of, despite the fact that they would otherwise have been under the jurisdiction of Cambodia since it was the flag State of the vessel, meaning the vessel was registered in Cambodia;<sup>32</sup>
- ◁ in the case of *JHA*, the UN Committee against Torture held that Spain had jurisdiction over a group of migrants from the time they were rescued in international waters and throughout the subsequent identification and repatriation process, including while some were detained in a former fish-processing plant in Mauritanian territory;<sup>33</sup>
- ◁ in the cases of *López Burgos* and *Lilian Celiberti de Casariego*, theLilian Celiberti de C(s)11o-4(ure)



Australian Senate Committee inquiry into the February 2014 riot in the Manus Island detention centre reported that:

The evidence provided to the committee by experts in international human rights law in relation to this issue was unequivocal in stating that Australia was, at the time of the disturbances in February 2014, and still is, exercising effective control with respect to the Manus Island RPC and the individuals held there. The committee considers that the degree of involvement by the Australian Government in the establishment, use, operation, and provision of total funding for the centre clearly satisfies the test of effective control in international law, and the government's ongoing refusal to concede this point displays a denial of Australia's international obligations.<sup>46</sup>

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

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

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

Responsibility for the identification and implementation of solutions for those in need of international protection and resolution for others would remain with all States involved in the regional processing arrangement.<sup>47</sup>

Specifically in relation to the proposed temporary settlement of recognised refugees in PNG, UNHCR has stated that:

Until safe and sustainable durable solutions are found in PNG or elsewhere, the safety and protection of refugees must remain the shared responsibility of the two States in accordance with the 1951 Refugee Convention.<sup>48</sup>

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

Accordingly, both Australia and either Nauru or PNG have obligations to find a durable solution for every asylum seeker found to be a refugee (or otherwise in need of international protection, such as complementary protection). As long as refugees remain in the community in Nauru or on Manus Island, waiting for a durable solution to be found, they are the responsibility of both Australia and the host State.



As a State party to the Optional Protocol to the International Covenant on Civil and Political Rights,



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<sup>6</sup> These treaties include the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child; International Convention on the Elimination of All Forms of Racial Discrimination and Convention on the Rights of Persons with Disabilities.

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

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<sup>22</sup> The UN Human Rights Committee has affirmed rights laid down in the Covenant to *anyone within the power or effective control* of that State party, even if not



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the Kaldor Centre (@kaldorcentre) on 10 and 11 November 2014. Previously, in its formal statement to the UN  
Australia accepts that there may be exceptional circumstances in which the rights and freedoms set out under the Covenant may be relevant beyond the territory of a State party (although notes that the jurisdictional scope of the Covenant is unsettled as a matter of international law). Although Australia believes that the obligations in the Covenant are essentially territorial in nature, Australia has taken into account the Committee circumstances in which the Covenant may be relevant extraterritorially. Australia believes that a high standard

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<sup>45</sup> UNHCR, *Visit to Nauru* DeR45