

**Title:** “Christmas Island: Australia’s Wake Up Call to its International Obligations”

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### **ABSTRACT**

*International Humanitarian Law is that branch of law that deals with safeguarding people during the time of armed conflict. In recent times, due to turbulent conditions worldwide, it has had an increasing role play. The Refugee Convention was adopted by the United Nations in 1951 to identify refugees, their rights, and the legal obligation of states in this regard. Australia has signed, as well as ratified this Convention, which makes it obligatory on their part to abide by the terms embodied in this. On more than one occasion, Australia has been found guilty of violating the Convention. The plight of the refugees and the atrocities meted out to them at the recent outbreak in Christmas Island has left the International community questioning the actions or rather, inactions of the Australian Government.*

*Through this paper, the authors wish to discuss the cause for such inaction, whether it constitutes a violation of Human Rights, and the possible solutions for the same. The authors try to deduce the possible consequences of non-compliance of the Convention , and intend to understand whether or not International Humanitarian Law has a substantial role to play in protecting refugees and asylum seekers.*

### **INTRODUCTION**

International humanitarian law (IHL) is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict.<sup>1</sup> It restricts the means of warfare, as

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<sup>1</sup>International Committee of the Red Cross, ‘What is International Humanitarian Law?’, Advisory Service on International Humanitarian Law, 2004, Available at: [http://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf) (last accessed: Feb 3,2014)

well as protects those people who are no longer involved in the hostilities. This branch of law is applicable only in the times of armed conflict and is thus known as law of armed conflict or law of war. Its applicability may also extend to refugees who are forcefully driven away from their own countries in war-torn times.

IHL is a part of International Law and thus the conventions and treaties signed in this regard are considered to be binding between States. These conventions may be between two or more States.

Living in a world where there is such intensive cross-border networking in every walk of life, International law assumes great importance. International treaties are signed as a watchdog to ensure that countries do not take law into their own hands. It is very important for countries to realise that their actions may have adverse effects on other countries. IHL lays down rules and procedures to be followed in times of armed conflict when there is large-scale violation of human rights and thousands are greatly affected. There is widespread migration across borders and this is where the International aspect comes into play.

### **I. THE STORY OF CHRISTMAS ISLAND: FACTS AND ISSUES**

Christmas Island is one in a million islands that is located between Indonesia and Australia in the Pacific Ocean. Bracketed by rain forest, steep cliffs and the sea, it rises from the enveloping darkness and becomes visible from the island's only inhabited corner, about 10 miles away.<sup>2</sup> The top five countries whose nationals seek asylum in Christmas Island are Afghanistan, Sri Lanka, Iran, Pakistan and Iraq, all of which have experienced horrific human rights and war incidents.

The first issue regarding the ill treatment of refugees is that all those arriving by boat to Australia, usually from the Indonesian port Java, are brought to Christmas Island first, where they, if allowed entry by the Australian Navy and not re-fouled back to terror land, are held up in electrified 13-foot-high razor-wire fence mandatory detention centers until their refugee claims are processed.

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<sup>2</sup>Norimitsu Onishi, Australia Puts Its Refugee Problem on a Remote Island Behind Razor Wire, N.Y. TIMES, NOV 4, 2009, available at, [http://www.nytimes.com/2009/11/05/world/asia/05island.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/11/05/world/asia/05island.html?pagewanted=all&_r=0) (last accessed: Feb 3, 2014)

Secondly, to top it all, Australia has entered into a territorial excision agreement with Papa New Guinea and Nauru, wherein refugees arriving at Christmas Island are transferred to these countries to ensure Australia's hands are clean under the 1951 Convention.

Thirdly, non-refoulement is a core obligation under the 1951 convention, under which a country is prohibited, to repatriate asylum seekers back to the country of their origin. Australia, on two occasions, has been found to breach this obligation where the Australian Navy had sent back refugee boats as they approached the coast.

## **II. ROLE OF INTERNATIONAL HUMANITARIAN LAW IN PROTECTING REFUGEES**

As mentioned earlier, IHL does not deal with internal disturbances or isolated instances of violence. This law is applicable only if the conflict has already begun and covers both international (more than one country) and non-international (a single country) armed conflicts. It places restrictions on methods of warfare, weapons, and protects those who are not, or are no longer taking part in the war.<sup>3</sup>

In this particular case, it is interesting to point out that IHL has no application, as this scenario falls outside its ambit. However, International Refugee Law and the laws pertaining to Human Rights are applicable here. There is a thin line which differentiates humanitarian law and human rights. Though they are similar in many aspects, the treaties and conventions pertaining to these are different. Also, Human Rights law applies even in times of peace, and may be suspended during times of war.<sup>4</sup>

International Refugee Law is the term given to the various treaties, conventions and protocols which are made in respect of refugees. The most important of these are: The 1951 Convention Relating to the Status of Refugees, and the 1967 Protocol Relating to the Status of Refugees (the New York Protocol). The 1951 Convention is the main feature in the International regime of refugee protection today. The 1967 Protocol updated and made amendments to the 1951 Convention, which included the removal of geographical and temporal restrictions.

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<sup>3</sup> See, note 1 supra

<sup>4</sup> Id.

There are 144 parties to the 1951 Convention and 145 Parties to the 1967 Protocol. Australia is a party to both these, while India is not a party to either<sup>5</sup>. Therefore these are binding on Australia and not on India. Failure to abide by any of the terms of these, results in a violation by the concerned country.

For a person to avail of the protection of these laws, he must be a refugee. Although there have been many definitions of a refugee, the most widely accepted definition is that which is incorporated in Article 1 (2) of the 1951 Convention.

Its acceptance is confirmed by the fact that there was no attempt to change this definition in the 1967 Protocol. Contrary to the usage in common parlance, an asylum seeker is not the same as a refugee. An asylum seeker is one who claims to be a refugee, but whose claim has not yet been definitively evaluated.<sup>6</sup> The United Nations High Commissioner for Refugees (UNHCR) provides guidelines for determining whether or not a person or a group of people qualify as refugees, asylum seekers, or neither.

### **III. AUSTRALIA'S INTERNATIONAL LAW OBLIGATIONS WITH RESPECT TO REFUGEES: TREATIES AND CONVENTIONS**

As a signatory to the 1951 Convention and the 1967 Protocol, Australia is bound by the terms of both these. The Australian Government has constantly maintained that the Refugee Conventions are applicable to persons residing in the territories of Australia only.<sup>7</sup>

#### **i. NON-REFOULEMENT**

Under Article 33 (1) of the Refugee Convention, contracting States are under an obligation of non-refoulement to not return refugees to a place where his/her freedom

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<sup>5</sup> Archives of the United Nations High Commissioner for Refugees. Available at: <http://www.unhcr.org/3b73b0d63.html> (last accessed: Feb 3rd 2014)

<sup>6</sup> Archives of United Nations High Commissioner for Refugees. Available at, <http://www.unhcr.org/pages/49c3646c137.html> (last accessed: Feb 3, 2014)

<sup>7</sup> Report of the Expert Panel on Asylum Seekers, 'Australia's International Obligations to refugees', August 2012. Available at, [http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/attachment\\_3\\_australia\\_international\\_obligations.pdf](http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/attachment_3_australia_international_obligations.pdf) (last accessed: Feb 4th 2014)

would be threatened on account of religion, race, Nationality, membership of a particular social or political group.

This obligation applies in cases where the refugee is being transferred to a third country, irrespective of whether or not that third country is a party to the Convention. So long as there is the possibility of imminent danger to the refugees at a particular place, they cannot be sent there. Australia has these same obligations under the International Covenant on Civil and Political Rights, 1966 (ICCPR)<sup>8</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984<sup>9</sup>.

When any cases of non-refoulement arise, there are several points that need to be considered, such as the personal risk faced by the claimant, the human rights records of the countries in question etc. Australia's obligations under the 1951 Refugee Convention extend even to those who are not entitled to this protection under the Refugee Convention.<sup>10</sup>

Interestingly, at the time of accession of the Convention, Australia had made a reservation relating to the expulsion of refugees, which it later withdrew after the General Assembly adopted the Protocol in 1967.<sup>11</sup>

ii. NON-DISCRIMINATION

Australia has obligations of non-discrimination under various treaties. Articles 2, 3 and 26 of the ICCPR all emphasise on this.

- Article 2 states that all signatories shall ensure that all individuals within their territory are subject to the rights set out in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion etc.
- Article 3 states that the State party shall ensure that there is equal enjoyment of the civil and political rights set forth in the covenant by men and women.

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<sup>8</sup> International Covenant on Civil and Political Rights, March 23,1976, Available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last accessed: Feb 4, 2014)

<sup>9</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26,1987, Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (last accessed: Feb 4, 2014)

<sup>10</sup> See, note 7 supra

<sup>11</sup> 'The Government of the Commonwealth of Australia makes a reservation with respect to the provisions contained in Article 32 of the Convention and does not accept the obligations stipulated in this Article', United Nations Treaty Series, Vol. 189, 202; Australian Treaty Series , No. 5, 16 (1954)

- Article 26 states that all are equal before the eyes of law and there must be no discrimination on any grounds.<sup>12</sup>

Article 2 of the Convention on the Rights of the Child, 1989 states that State parties shall ensure the rights set forth in the convention are available to every child without discrimination on any grounds and the child must be protected against all forms of discrimination or punishment on the basis of beliefs, opinions, status or activities of the child's parents, legal guardians or family members.<sup>13</sup>

Not all forms of differentiation of treatment will amount to discrimination if the criteria are reasonable and objective with the aim of achieving a legitimate purpose.

### iii. MARITIME RESCUE

Under the International Convention for the Safety of Life at Sea (SOLAS), 1974 the master of a ship in a position to provide assistance must, on receiving information of persons in distress at sea, proceed with all speed to their assistance. This obligation is applicable irrespective of the status, or nationality, or the circumstances in which they are found. The State in whose search and rescue region (SRR) the rescue or assistance to those in distress has taken place, has the primary responsibility to ensure that there is cooperation and coordination between Governments and survivors are delivered to a place of safety. In practice, this place of safety is usually the nearest convenient port.<sup>14</sup>

According to the International Convention on Maritime Search and Rescue, 1979, a party is under the obligation to use search and rescue units and any other means to assist and rescue those in distress at sea. The State shall ensure this is done irrespective of the status, nationality or status in which the person is found. In the case of a refugee or displaced person, the concerned consular or diplomatic authorities shall notify the office of the competent international organisation.<sup>15</sup>

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<sup>12</sup> See, note 8 supra

<sup>13</sup> Convention on the Rights of the Child, Nov 20, 1989, Available at: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (last accessed: Feb 4, 2014)

<sup>14</sup> International Convention for the Safety of Life at Sea (SOLAS), May 25, 1980, Available at: [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx) (last accessed: Feb 4, 2014)

<sup>15</sup> International Convention on Maritime Search and Rescue, 1979, April 27, 1979, Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf> (last accessed: Feb 4, 2014)

iv. STATE RESPONSIBILITY

As signatories to any convention or treaty, the State is under an obligation to ensure that the terms of these are abided by and implemented. There are certain rules to determine when the State is responsible for a breach of International Law. The State may be held responsible for:

- the actions of its officials to the extent that they are acting in their official capacity,
- the actions of bodies or persons which are not State bodies, if it are directs or instructs these,
- the wrongful conduct committed by another State if it knowingly assists that conduct.

The Montevideo Convention of 1973, defines what constitutes a State, and elaborates on the rights and duties of the States. Article 1 says a State is an entity which possesses a) a permanent population, b) a definite territory, c) Government, and d) the capacity to enter into International Relations with other States. Article 9 states that the jurisdiction of a State within the National territory applies to all the inhabitants. Irrespective of whether they are nationals or foreigners, they are under the same protection of the law and national authorities. They may not claim rights which are more extensive than those available to the nationals<sup>16</sup>. Though Australia is not a signatory to this treaty, through customary International Law, this acts as a source of International law, thus making it binding on Australia as well.

**IV. FACTS, LEGAL ISSUES AND APPLICABILITY OF TREATIES AND CONVENTIONS**

Asylum seekers and refugees are drawn to particular countries by a range of obvious factors— proximity, family and ethnic community networks, employment opportunities and wage levels, generosity of welfare systems, levels of tolerance

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<sup>16</sup> Montevideo Convention on the Rights and Duties of States, December 26, 1933. Available at: <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897> (last accessed Feb 5,2014)

within existing societies, and the accessibility of determination systems.<sup>17</sup> For similar reasons, Christmas Island has seen an influx of refugees in recent years.

#### A. MANDATORY DETENTION CENTERS FOR REFUGEES

Australia maintains one of its immigration detention centers at Christmas Island. It is a mandatory detention center for all asylum seekers, irrespective of their gender or age, installed for security and health concerns due to the recent influx of refugees flooding the Australian shores. These detainees are held up indefinitely with no information or intimation on when their refugee claims would be processed. It was opened in 2008, but is far from the required international standards to be observed. In fact Christmas Island currently houses four detention facilities: the North West Point immigration detention center; Lilac and Aqua compounds; the so-called Construction Camp at Phosphate Hill for families, unaccompanied minors and Indonesian crew, which makes use of the dongas used to house the workers building the North West Point center; and another, smaller detention facility adjacent to the Construction Camp with demountables and tents for single men.<sup>18</sup> As of 5 September 2013, there were 6,579 people in closed immigration detention facilities in Australia, including 1,428 children.<sup>19</sup>

##### i. HUMANITARIAN CONDITIONS

UNHCR Regional Representative, Richard Towle, following his visit to the electrified, 13-foot-high razor-wire fence detention center has expressed concerns over the humanitarian conditions in the following words: *“The combination of mandatory detention, suspension of asylum claims and the geographical isolation of detention facilities such as Curtin Air Force Base in Western Australia – all without*

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<sup>17</sup>Refugee Council of Australia, ‘Australia’s refugee and humanitarian program’, February 2010, available at, <http://www.refugeecouncil.org.au/r/isub/2010-11-IntakeSub.pdf>Australian Human Rights Commission (2009). (last accessed Feb 2, 2014)

<sup>18</sup>Klaus Neumann, ‘Strange days on Christmas Island’, Inside Story, 24 June 2010, available at, <http://inside.org.au/strange-days-on-christmas-island/#sthash.GDvYFhtW.dpuf>, (last accessed: Jan 27, 2014)

<sup>19</sup> Australian Human Rights Commission, ‘Asylum seekers, refugees and human rights: Snapshot report 2013’, p.9 available at [http://www.humanrights.gov.au/sites/default/files/document/publication/snapshot\\_report\\_2013.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/snapshot_report_2013.pdf) (last accessed Feb 3, 2014)

*any effective judicial oversight – is a deeply troubling set of factors.*<sup>20</sup> Such measure ultimately causes adverse impact on the health and psycho-social well being of the detainees, who have already suffered tremendous trauma and torture in their home countries. There is a significant lack of medical facilities. The condition of children has been constantly deteriorating. There are barriers faced by lawyers to provide representation and the unmanageable seven day wait for lodgement of a request for Ministerial intervention following a status review refusal.<sup>21</sup>

78 detainees were on a hunger strike in protest of the ill-informed procedures of refugee claims.<sup>22</sup> A group of nine Iranians had sewn up their mouths and protested to use contraband needles and dental floss to sew their eyelids shut.<sup>23</sup>

ii. BREACH OF INTERNATIONAL OBLIGATIONS

Australian government in April 2010, announced the freezing of asylum application from persons from Afghanistan and Sri Lanka, and opened the Curtis Base detention center for them.<sup>24</sup> Detaining refugees indefinitely without giving them an opportunity to apply for asylum is a violation under the Convention against Torture and other Inhuman, Cruel or Degrading Punishment, 1984 and the Refugee Convention, 1951. For instance, Australia has binding obligations under article 9(1) of the ICCPR and article 37(b) of the CRC to ensure that no one is subjected to arbitrary detention.

The 1951 Convention specifies that, barring exceptional circumstances (threat to national security), refugees must not be punished for their unauthorized entry or stay. Prohibited penalties might include being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum.<sup>25</sup>

Finally, the Convention lays down basic minimum standards for the treatment of

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<sup>20</sup> Archives of United Nations High Commission Refugees, 'UNHCR disappointed at Australian decision to reopen detention centre for asylum-seekers', April 20th 2010, available at, <http://www.unhcr.org/4bcd99956.html> (last accessed Jan 28, 2014)

<sup>21</sup> Refugee Council of Australia, 'Australia's refugee and humanitarian program', February 2010, available at, <http://www.refugeecouncil.org.au/r/isub/2010-11-IntakeSub.pdf> Australian Human Rights Commission (2009). (last accessed Feb 2 2014).

<sup>22</sup> Paige Taylor, 'Lips stitched, dozens on hunger strike on Christmas Island', The Australian, Jan 16, 2014 <http://www.theaustralian.com.au/news/nation/lips-stitched-dozens-on-hunger-strike-on-christmas-island/story-e6frg6nf-1226802748546#mm-premium>, (last accessed: Feb 3, 2014)

<sup>23</sup> Id.

<sup>24</sup> See note 4, supra

<sup>25</sup> Article 31(1), Convention Relating to the Status of Refugees 1951, available at <http://www.unhcr.org/3b66c2aa10.pdf> (last accessed Jan 28, 2014)

refugees, without prejudice to States granting more favorable treatment.<sup>26</sup> Australia, by freezing asylum application of only two States' nationals has breached this obligation of no less favorable treatment. Some of these minimum standards are access to courts, primary schooling, identity documentation and minimum work. States, usually issue a 'Nansen passport', which is referred to as an identity document of refugees. None of these prescribed standards have been adhered to by Australia despite the continuous interventions by UNHCR.

In establishing a two-tier system for processing asylum claims which subjects unauthorised boat arrivals to a non-statutory refugee status assessment process without judicial review, the policy is widely deemed to breach Australia's international protection obligations.<sup>27</sup>

iii. IMPACT ON CHILDREN DETAINEES

Senator Hanson-Young has described the detention center as creating a new generation of damaged refugees. She cited the case of a four-year-old Iranian girl who arrived on Christmas Island "bubbly and talkative" six months ago, and has now withdrawn completely, and could only utter the word "jail" during a 30-minute encounter.<sup>28</sup> As at 5 September 2013, there were 1,428 children in closed immigration detention.<sup>29</sup> The average age of children in closed detention facilities was 10 years old.<sup>30</sup> Children in the detention centers, have not been sent to primary schools, have entered a state of traumatic depression, and the trauma of unaccompanied minors sent to offshore refugee units with worse unmonitored conditions. Australia's system of mandatory detention requires that children remain in closed immigration detention until they are granted a visa or removed from Australia, unless the Minister for Immigration and Border Protection (the Minister) decides to make a residence

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<sup>26</sup>Id.

<sup>27</sup> See note 5, supra. Also see, Australian Human Rights Commission (2009). 'Immigration detention and offshore processing on Christmas Island', p.16, available at [http://www.hreoc.gov.au/Human\\_RightS/immigration/idc2009\\_xmas\\_island.html](http://www.hreoc.gov.au/Human_RightS/immigration/idc2009_xmas_island.html), (last accessed Feb 2 2014)

<sup>28</sup>Michael Gordon, 'Christmas Island worse than Jordan refugee camp', The Sydney Morning Herald, Jan 28, 2014, available at, <http://www.smh.com.au/federal-politics/political-news/christmas-island-worse-than-jordan-refugee-camp-20140127-31iww.html#ixzz2sNFN0DNu>, (last accessed: Jan 31 2014)

<sup>29</sup> See note 19, supra at p.9

<sup>30</sup> Id.

determination allowing them to live in community detention.<sup>31</sup>

The Asian Human Rights Commission (AHRC) conducted the National Inquiry and found that Australia's system of mandatory immigration detention of children was fundamentally inconsistent with Australia's human rights obligations, one reason being that it is used as first resort.<sup>32</sup> The National Inquiry found that children in immigration detention for long periods of time are at high risk of serious mental harm.<sup>33</sup>

iv. CONDEMNATION BY AUSTRALIAN HUMAN RIGHTS COMMISSION AND UNHCR

The Commission has long recommended that, instead of requiring the mandatory immigration detention of broad groups of people, a person should only be detained if it is shown to be necessary in their individual case.<sup>34</sup> Further, time limits for detention and access to judicial oversight of detention should be introduced to ensure that a person is not detained for longer than is necessary.<sup>35</sup>

United Nations Human Rights Committee (UNHRC) has repeatedly found Australia to be in breach of its international obligations under article 9(1) of the ICCPR.<sup>36</sup> The detention albeit lawful allowed under the municipal law, if unjust or arbitrary calls for the breach, if not done reasonably and with necessary measures.

## **B. TERRITORIAL EXCISION BY AUSTRALIA**

Excision of territory means excluding certain portions of the territory of the State from its jurisdiction. In practice, States can exercise a milder form of excision by

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<sup>31</sup> Id.

<sup>32</sup> Human Rights and Equal Opportunity Commission, 'National Enquiry into Children in Immigration Detention: A last resort', April 2004, available at [https://www.humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf) (last accessed Feb 1, 2014)

<sup>33</sup> Id.

<sup>34</sup> See note 19, supra

<sup>35</sup> Id.

<sup>36</sup> Human Rights Committee's comments in *A. v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), para 9.4, available at, [www.unhcr.org/refworld/docid/3ae6b71a0.html](http://www.unhcr.org/refworld/docid/3ae6b71a0.html) (last accessed: Feb 1, 2014)

excluding the territory for the definition of a particular act or conduct.<sup>37</sup> The current Australian immigration laws define ‘entering into Australia’ as ‘entering into migration zone’. The Migration Amendment (excision from migration zone) Act 2001 excludes Cocos Island, Christmas Island, Ashmore Reef and Cartier reef.<sup>38</sup>

Prime Minister Kevin Rudd, of the Labor party Government in 2007 abolished what was popularly known as the Pacific Solution, or the territorial excise agreement as inhumane and unfair. Rudd lost his leadership in 2010 and his successor Julia Gillard reinstated the Pacific Solution. When Rudd returned as the Prime Minister in 2013, having learnt his lesson did not touch the policy. It was in the context of another re-election bid in July that Rudd eliminated the possibility of any boat person ever settling in Australia.<sup>39</sup> The controversial Pacific Solution designed to discourage the inflow of boats into Australia’s territorial waters has in-fact, resumed the traffic with apparent intensity since 2009.<sup>40</sup>

i. EXCISION DOES NOT EXEMPT AUSTRALIA FROM OBLIGATIONS

Under international law, every state has exclusive jurisdiction of its territory and persons within that territory. However, the State also has its ‘State responsibility’ as per the Montevideo Convention. Further, it is accepted principle that a State should not seek to create a selective definition of “territory” in order to avoid its protection obligations to those asylum seekers who arrive within its territory.<sup>41</sup> The Prime Minister opined as per the Australian Parliamentary Debates, from a legal point of view, that the territories would 'technically become like Norfolk Island which has its own migration regime but is still a territory of Australia' but most importantly, he indicated that there will still of course be our obligations under the refugee convention and those obligations continue to be fully met by Australia'.<sup>42</sup>

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<sup>37</sup> Andreas Zimmermann, ‘The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary’, Oxford University Press,153 (2011)

<sup>38</sup> Id.

<sup>39</sup> Luke Mogelson, ‘The dream boat’, New York Times Magazine, Nov 15 2013, available at, [http://www.nytimes.com/2013/11/17/magazine/the-impossible-refugee-boat-lift-to-christmas-island.html?\\_r=2&](http://www.nytimes.com/2013/11/17/magazine/the-impossible-refugee-boat-lift-to-christmas-island.html?_r=2&) (last accessed: Feb 5 2014)

<sup>40</sup> See note 21 supra at p.154

<sup>41</sup> Id. at p.3

<sup>42</sup> Nathan Hancock, ‘Refugee Law - Recent Legislative Developments’, Law and Bills Digest GrSeptember 18,2001), available at [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publicati](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publicati)

The excision policy excludes Australia from observing protection to refugees by excluding them access to refugee determination process. UNHCR's position has always been for all asylum-seekers arriving into Australian territory, by whatever means, and wherever, to be given access to a full and efficient refugee status determination process in Australia. This would be consistent with general practice, and in line with international refugee law<sup>43</sup> Its obligations under the ICCPR and CROC still remain and cannot be excluded by any agreement. In international law, international burden sharing is encouraged, however, the excision agreement is more of discarding burden rather than sharing it.

Volker Türk, UNHCR's Director of International Protection commented: "*Under international law any excision of territory for a specific domestic purpose has no bearing on the obligation of a country to abide by its international treaty obligations which apply to all of its territory. This includes the 1951 Refugee Convention, to which Australia is a party*".<sup>44</sup>

Hence, where asylum seekers have been transferred to a third country, it does not dissolve the host country of its obligations but must be shared.

ii. EXTRA-TERRITORIAL APPLICATION OF OBLIGATIONS UNDER 1951 CONVENTION

Under international human rights law, the meaning of the *non-refoulement* principle extends beyond Art. 33 (1) of the 1951 Geneva Convention, as *non-refoulement* duties also derive from Art. 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as from general international law.<sup>45</sup>

Australian navy has on two occasions<sup>46</sup> since September 2013 returned two boats carrying asylum seeker, as they approached the coast, back to Indonesia. Non-refoulement or non- returning of asylum seekers back to their home country where they would face persecution is a core obligation under the 1951 Convention.

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[ons Archive/CIB/cib0102/02CIB05](#) (last accessed: Feb 4,2014)

<sup>43</sup> Archives of UNHCR, 'New "excision" law does not relieve Australia of its responsibilities towards asylum-seekers', May 22 2013, available at <http://www.unhcr.org/519ccec96.html>, (last accessed on Feb 4<sup>th</sup> 2014)

<sup>44</sup> Id.

<sup>45</sup> European Union Agency for Fundamental Rights, European Court of Human Rights Handbook on European law relating to asylum, borders and immigration, 61,(April 2013) available at [http://www.echr.coe.int/Documents/Handbook\\_asylum\\_ENG.pdf](http://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf) (last accessed Feb 6th 2014)

<sup>46</sup> See note 39, supra

Australia may argue, that the re-fouling was done firstly, from Christmas Island which is not a part of its territory for the purpose of 1951 Convention, as per the territorial excision agreement entered into with Papa New Guinea and Nauru, and secondly that the interception by Australia took place in the high seas and hence not within Australian territory.

However, Australia can still be held liable under the extra territorial principle propounded by the European Court of Human Rights(ECHR) and later confirmed by the UN Advisory Committee that a contextual analysis of Article 33 of the 1951 Convention further supports the view that the scope *ratione loci* of the *non-refoulement* provision in Article 33(1) is not limited to a State's territory.<sup>47</sup> The advisory opinion also emphasized that the extraterritorial applicability of the *non-refoulement* obligation under Article 33(1) is clear from the text of the provision itself, which states a simple prohibition of non refoulement of a refugee to the country where he/she faces danger.<sup>48</sup> Subsequent state practice too, does not rely anywhere on territoriality for the non-refoulement obligations in any refugee or human rights agreements entered into.

In *Sale, Acting Commissioner, Immigration and Naturalization Service v. Haitian Centers Council, Inc*<sup>49</sup>, Haiti persons were intercepted in the High Seas by the U.S Coast Guard, and sent back. The U.S Supreme Court held that Article 33(1) of the 1951 Convention is only applicable within the territory. This view has been condemned by the UNHCR, which opined that Article 33 has no geographical limitations. The latter has also been reiterated by the UN Advisory opinion on 1951 Convention.

The opinion of the dissenting judge in *Sale*, Blackmun J is interesting. He said “*an absurd anomaly.... Non return is the rule; the sole exception (neither applicable nor invoked here) is that a nation endangered by a refugee's very presence may 'expel or return' him to an unsafe country if it chooses. The tautological observation that only a refugee already in a country can pose a danger to the country 'in which he is'*

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<sup>47</sup>UN Advisory Opinion on the Extraterritorial application of Non-Refoulement Obligations under the 1951 Convention and its 1967 Protocol, p.13 available at <http://www.refworld.org/pdfif/45f17ala4.pdf>, (last accessed Feb 5<sup>th</sup> 2014)

<sup>48</sup> Id. at p.12

<sup>49</sup> 509 U.S. 155 (1993)

*proves nothing.*"<sup>50</sup>

The International Court of Justice has confirmed that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.<sup>51</sup> The Court observed that, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions."<sup>52</sup>

Similarly, the Committee against Torture (CAT) reiterated, "*its previously expressed view that obligation includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised*" and made it clear that these provisions "*apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.*"<sup>53</sup>

The ECHR has also come to a similar conclusion that apart from jurisdiction, the imperative criteria is whether a person is within the effective control or is affected by those acting in control of the concerned State. In *Bankovic et al. v. Belgium and 16 other contracting States*<sup>54</sup>, it held that, "from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial<sup>55</sup>, it may extend extraterritorially if a State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of

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<sup>50</sup> Id. at p.194

<sup>51</sup> International Court of Justice in 'Case Concerning Armed Activities on the Territory of the Congo' (*DRC v. Uganda*), (2005) ICJ Gen. List No. 116, 19 December 2005, para. 216, also see note 33 supra at p.17

<sup>52</sup> International Commission of Jurists, FIDH, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', para. 109, available at <http://www.fidh.org/IMG/pdf/il2302a.pdf>, (last accessed Feb 5<sup>th</sup> 2014), also see note 33 supra at p.17

<sup>53</sup> Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006, para 15

<sup>54</sup> *Bankovic et al. v. Belgium and 16 other contracting States (Admissibility)*, Application No. 52207/99, 12 December 2001

<sup>55</sup> *Ibid.* at para 59, also see note 33 supra at p.18

the public powers normally to be exercised by that government.”<sup>56</sup>

In *Öcalan v. Turkey*<sup>57</sup>, it was held that a situation in which a person is brought under the “effective control” of the authorities of a State if they are exercising their authority outside the State’s territory may also give rise to the extraterritorial application of Convention obligations.<sup>58</sup>

Therefore, it has been held in various cases that Article 33(1) has extra territorial application. In the case of Australia, Christmas Island is an excised territory. But in the lines of ECHR is clear that even if the jurisdiction is ousted, since there is effective control by the Australian government over Christmas Island, they cannot escape their obligations under the 1951 Convention. As far as the refoulement of refugees to restrict their entry into Christmas Island, is concerned, in the opinion of the UNHCR and the UN Advisory Committee on the 1951 Convention, this would amount to violation of Article 33(1) no matter if it was done at the high seas.

iii. TRANSFER TO ‘DECLARED STATES’

Australia entered into two territorial excise agreements with Papua New Guinea(PNG) and Nauru. Under the Regional Settlement Agreement asylum seekers arriving unauthorized by boat after 19 July 2013 will be transferred to PNG for processing and resettlement (if found to be refugees) and if found not to be refugees they will be returned to their country of origin or a country where they have a right of residence.<sup>59</sup>

On 3 August 2013 the Australian Government also signed a new Memorandum of Understanding with Nauru which provides that the Nauruan Government will enable individuals whom it has determined are in need of international protection to settle in Nauru, ‘subject to agreement between Participants on arrangements and numbers’.<sup>60</sup>

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<sup>56</sup> See note 40 supra at para 79

<sup>57</sup> *Öcalan v. Turkey* (Preliminary Objections), Application No. 46221/99, Judgement of 12 March 2003

<sup>58</sup> *Ibid.* at para. 93, also see note 33 supra at p.18

<sup>59</sup> See note 19, supra

<sup>60</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 ,August 3, 2013. Available at, [www.dfat.gov.au/issues/people-smuggling-mou.html](http://www.dfat.gov.au/issues/people-smuggling-mou.html) (last accessed:Feb 1,2014), also see note 13 supra

They will only have their claims for refugee status assessed in Australia if the Minister for Immigration and Citizenship makes a personal decision to allow them to, on the basis of it being in the public interest to do so.<sup>61</sup> This move by the Australian government has been condemned by the UN and described by their former Prime Minister, Malcolm Fraser, as shifting humans to gulags in the third world.<sup>62</sup>

It is to be noted that the two countries mentioned above are highly dependent on Australia for funds. Transferring refugees to a third country, financially dependent on Australia, it would be close to impossible if the conditions there were any better if not worse. After a visit by the UNHCR, a statement was released that the condition in PNG and Nauru was far from adequate. Their processing centers to which asylum-seekers have been transferred, including the reception conditions and delays in establishing legal frameworks for refugee status determination.<sup>63</sup> There were no protection safeguards, poor physical conditions within open-ended, mandatory and arbitrary detention settings and aggravated by noise and dust in the construction of the permanent detention center.<sup>64</sup>

A UNHCR Report on the condition of refugees in offshore detention centers has found that every asylum seeker housed in offshore processing facilities is displaying "apparent signs of anxiety and depression", again raising questions about the legality of the Australian government's policy of offshore processing.<sup>65</sup> Key recommendations of UNHCR's report are the need for more information and clarity for asylum-seekers about their situation, and counselling on the procedures, time frames of various steps in line with international standards and adequate accommodation.<sup>66</sup>

Last September, Arne Rinnan, the captain of the Tampa, told an interviewer that he had recently received a letter from Nauru, written by one of the Afghans he had

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<sup>61</sup> See note 43, supra

<sup>62</sup> Oliver Laughland, 'The New York Times was right to send reporters on a refugee boat to Australia', The Guardian, Sep 10 2013 available at, <http://www.theguardian.com/commentisfree/2013/sep/10/new-york-times-boat-reporters>, (last accessed :Feb 6,2014)

<sup>63</sup> Id.

<sup>64</sup> Archives of UNHCR, 'UNHCR troubled by new Australia-PNG asylum agreement' , July 26, 2013, available at, <http://www.unhcr.org/51f2560d9.html> (last accessed: Feb 6,2014)

<sup>65</sup> Oliver Laughland, 'All Manus Island detainees show signs of anxiety and depression', The Guardian, July 12, 2013, available at, <http://www.theguardian.com/world/2013/jul/12/united-nations-report-manus-island>, (last accessed: Feb 7,2014)

<sup>66</sup> Archives of UNHCR, 'UNHCR releases report critical of Nauru processing centre' , Dec 14<sup>th</sup> 2013, available at, <http://www.unhcr.org/50cb0f759.html>, (last accessed: Feb 7 2014)

rescued. According to Rinnan, the man said that “*I should have let him die in the Indian Ocean, instead of picking him up.*”<sup>67</sup>

## V. CONCLUSIONS & RECOMMENDATIONS

One may wonder what importance International Law holds, with its bleak enforcement mechanisms. In this shrinking world we live in, it is of utmost importance to have good relations with other countries. Constant violation of cross-border agreements will result in loss of trust by the International community.

In this case, Australia has violated its obligations at several instances. But who hold them responsible? Who are they accountable to for their inhuman and degrading treatment of thousands? Several International organisations, including the UNHCR have condemned their actions, yet we see no improvement in this regard. The plight of the refugees is only worsening. Stronger enforcement mechanisms must be put in place to ensure countries abide by their various agreements, with penalties such as sanctions put in place to deter deviation from the terms of any agreement.

It is time the world, including, and especially Australia, woke up to its obligations in the humane treatment of humanity. The General Assembly, in 2003, extended the mandate of the UNHCR “until the refugee problem is solved.” The UNHCR must issue a warning to the defaulting countries, in this case Australia, instead of mere condemnation of action. In case of continued failure to comply with the ideals of the UNHCR, on the order of the UNHCR, all member nations should protest against the atrocities tendered out to the refugees and asylum seekers by posing economic sanctions such as refusing to trade with the defaulting country. Apart from this, the UN must make an effort to improve conditions not only in the detention centers in the host country, but also eliminate the unfavourable conditions in the home country.

*“Someday, I hope that we will all be patriots of our planet and not just of our respective nations.”*

— Zoe Weil, *‘Most Good, Least Harm: A Simple Principle for a Better World and Meaningful Life’*.

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<sup>67</sup> See note 39, supra

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