



Normalising Offshore Detention: Government Framing and Refugee Protection in Australia

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Abstract

Australia's refugee governance regime has increasingly moved away from a protection-based model towards one based on deterrence, externalisation and migration control. Australia is a signatory to the 1951 Refugee Convention and its 1967 Protocol, but its offshore processing regime, particularly on Nauru and Christmas Island, has faced ongoing legal and humanitarian criticism concerning its compliance with international refugee law and the principle of non-refoulement. This article heavily examines the ways in which legal laws and the framework intended to protect refugee rights have been used in practice to purposefully to detain refugees, enforce access to asylum procedures and divide state responsibility through offshore processing arrangements.

Using legal methods, government policy, parliamentary material, judicial decisions and publicly available evidence, including the Nauru Files and reporting on Australia's offshore detention regime, the article traces the development of Australia's externalisation policies and the political narratives that support them. Allegations of abuse, long detention, refugee deaths and the ignorance of responsibilities between Australia and Nauru are given maximum attention, creating a confusing legal landscape in which accountability is often contested. The article argues that Australia's offshore detention system is part of a broader transformation in refugee governance, raising important questions about state responsibility, legal ignorance and the future of refugee protection.

Keywords: Refugee Governance; Offshore Detention; Externalisation; Government Framing; Non-Refoulement.

The international refugee protection regime, based on the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol¹, was founded on the idea that those fleeing persecution should be granted international protection regardless of how they seek asylum². Over the last 30 years, however, there has been a shift away from this protective

¹ Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)

² Convention relating to the Status of Refugees, art 31; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 267–320; James C Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge University Press 2021)

framework of refugee governance to a focus on deterrence, border securitisation and migration control³. Many states have sought to prevent the arrival of asylum seekers in their territories through visa restrictions, naval interception, third-country agreements and offshore processing arrangements, rather than by expanding access to asylum. Australia is one of the most developed examples of this transformation. Australia has been internationally recognised as one of the world's most successful multicultural societies⁴, but its historical development reflects a complex trajectory of colonisation and migration. The continent was home to Aboriginal and Torres Strait Islander peoples for tens of thousands of years before British colonisation in ⁵, and the settler-colonial state that emerged thereafter grew through successive waves of immigration. Since then, modern Australia has grown into a culturally diverse nation whose demographic and economic development has been heavily influenced by migration. And yet this history is in complete opposition to the country's current refugee policies. Australia is a State Party to the 1951 Refugee Convention and its 1967 Protocol. Yet asylum seekers arriving irregularly by sea have become increasingly portrayed in political discourse as threats to border security and, often, as "queue jumpers"⁶. This has legitimised increasingly restrictive migration policies that draw a sharp distinction between authorised migration and spontaneous claims for international protection. While a significant amount of research has emerged around Australia's refugee policies and offshore detention regime, little research has focused on how government framing contributes to the normalisation of detention through shaping public perceptions, while also creating a disconnect between legal protections and the lived experiences of refugees. This article addresses this gap by focusing on legal analysis and socio-legal perspectives to examine the relationship between policy narratives, practices of detention and the experiences of refugees. By examining the relationship between government discourse, legal structures and public perception, the research provides a more in-depth understanding of how detention is normalised within a democratic legal framework as well as helping to broaden the literature on migration governance, refugee protection and socio-legal research.

This wider transition from protection to deterrence is reflected in Australia's current refugee governance framework. Mandatory immigration detention, maritime interception and offshore processing have become increasingly defining features of Australia's asylum system. Nauru and Christmas Island have been prominent in this externalised migration

³ Thomas Gammeltoft-Hansen and James C Hathaway (eds), *Non-Refoulement in a World of Cooperative Deterrence* (Cambridge University Press 2024); Violeta Moreno-Lax and Mariagiulia Giuffr , 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019)

⁴ Smolicz, J. J. (1995). The emergence of Australia as a multicultural nation an international perspective. *Journal of Intercultural Studies*, 16(1-2), 3-23

⁵ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 'Australia's First Peoples' <<https://aiatsis.gov.au>>; Henry Reynolds, *The Other Side of the Frontier* (UNSW Press 2006)

⁶ Juss, S. S. (2017). Detention and delusion in Australia's Kafkaesque refugee law. *Refugee Survey Quarterly*, 36(1), 146-167

architecture. Successive governments have argued these measures are necessary to deal with irregular migration⁷, prevent deaths at sea and protect the integrity of Australia's migration programme. The offshore detention regime has also been the subject of sustained criticism from international organisations, domestic enquiries, courts, medical professionals, journalists and civil society organisations. Allegations of prolonged detention, deteriorating mental health, substandard medical care, violence, abuse, and the increased vulnerability of children in offshore processing facilities have been documented in publicly available evidence, including the Nauru Files, parliamentary enquiries, United Nations reports, and independent investigations. At a more fundamental level, Australia's reliance on offshore processing has led to the continuing legal debate over whether the geographical relocation of asylum procedures relocates the responsibility for refugee protection. By shifting asylum seekers to detention facilities outside the Australian offshore detention camps, Australia created arrangements with countries like Nauru and Christmas Island that has made it difficult to speculate legal responsibility and have outsourced many of the humanitarian impacts of immigration detention. These developments raise important questions about the continuing importance of international refugee law, most importantly the principle of non-refoulement, and whether outsourcing of asylum processing changes the meaning and raises questions of Australia's international legal obligations.

This article focuses on how Australia's offshore detention program has affected the legal structure of refugee governance, particularly in relation to the outsourcing of asylum processing and the reallocation of legal responsibility. It argues that Australia's offshore detention policy is not *prima facie* a geographical relocation of refugees but part of a wider legal and political scheme where responsibility for refugee protection is increasingly distributed across a many jurisdictions and countries and companies. Pointing to the concept of frame drain, the paper also argues that humanitarian understandings of refugee protection have been displaced over time by narratives focused on sovereignty, border control, and enforcement, enabling legal mechanisms originally intended to protect refugees to function instead as instruments of migration management. This article examines the extent to which Australia's offshore policies are line with with international refugee law, in particular the principle of non-refoulement, through an study of Australia's offshore processing framework, relevant legislation, judicial decisions, government policy, parliamentary sources and publicly available evidence. In so doing, it contributes to wider debates around externalisation, accountability of the state and the future of refugee protection in an increasingly restrictive system of global migration governance. The paper then reviews research on refugee externalisation. It then examines the international legal framework for refugee protection, the historical evolution of Australia's offshore detention program, the functioning of offshore processing, and the implications of these developments for international refugee law.

Literature review:

Over the past two decades, Australia's offshore detention regime has been analysed from different perspectives. The original research focused on whether Australia's compulsory

⁷ Koser, K. (2005). *Irregular migration, state security and human security* (p. 10). Geneva: GCIM

detention and offshore processing would match with international refugee law obligations. As these policies became firmly established, the focus shifted to deterrence, externalisation and the use of border control as a migration deterrent. More recent work has examined the ways that governments shape public understanding of refugees through political loopholes, media narratives, and laws which are solely created for refugee deterrence under the guise of refugee protection. The study examines how Australia's refugee system has evolved. But they seldom consider the ways in which legal rules, political narratives and public perception join to make detention seem both necessary and acceptable. Much of the literature starts with the purpose of refugee protection itself. Hathaway and Goodwin-Gill argue that the Refugee Convention was intended to protect individuals who flee persecution and to place legal limitations on the exercise of state sovereignty. Refugee law was not intended to be yet another tool of immigration control, but a system that ensures access to protection regardless of political convenience. Their work has shaped the understanding of refugee status, state responsibility and the principle of non-refoulement, which remains the foundation of international refugee protection⁸. Carens looks at the same question from another perspective. He does not talk about legal obligations but questions the moral justification for restricted border policies in liberal democracies. He said opportunities should not be based mainly on citizenship at birth and that states must show why they exclude those seeking protection⁹. His work is not exclusive to refugee law, but it does provide an important ethical basis to consider Australia's asylum policies. It shifts the focus away from the state's right to exclude to the rights of individuals seeking safety and raises broader questions about whether the mode of entry should affect access to protection. These questions are particularly important in Australia where successive governments have introduced policies to stop irregular maritime arrivals, but have also continued to assert their commitment to international refugee law. McAdam argues that Australia's refugee policies cannot be understood in purely domestic law terms and must be assessed against Australia's obligations under international law. Her work shows that refugee protection continues to create obligations on states even where asylum procedures are varied by domestic policy or administrative arrangements. This is an important starting point for understanding the legal questions surrounding Australia's offshore detention system. With the rise of offshore detention, focus has increasingly shifted to externalisation. Rather than simply asking whether detention was lawful, researchers began to investigate why and how asylum processing had been moved offshore from Australia and what that meant for responsibility for refugee protection. According to Gammeltoft-Hansen, externalisation allows states to extend the control of migration beyond their territorial boundaries through agreements with other governments and other

⁸ James C Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge University Press 2021); Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, Oxford University Press 2021)

⁹ Joseph H Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49(2) *The Review of Politics* 251–273, 251–270. Carens argues that citizenship acquired by birth is morally arbitrary and that liberal states bear the burden of justifying the exclusion of non-citizens

administrative mechanisms¹⁰. Similarly, Moreno-Lax asks whether moving asylum procedures also moves legal responsibility. Taken together, these studies show how externalisation is more than a geographical shift. It alters the way responsibility is structured and when refugee rights are affected accountability is more difficult to determine. Australia is one of the most prominent examples of this approach. Gleeson and McAdam show that offshore detention developed gradually through legislation, executive policy, bilateral agreements and administrative practice, rather than by a single policy decision¹¹. Spijkerboer builds on this debate by examining the unequal relationship between Australia and the Pacific states involved in offshore processing. His work shows how formal agreements may appear to divide responsibility while Australia's continuing financial, political and operational involvement raises important questions about accountability. This research demonstrates that offshore detention cannot be reduced to a border policy. It represents a larger structure through which migration control is exercised beyond national territory, while legal responsibility is increasingly dispersed.

Legal analysis alone cannot explain the prevailing political acceptability of offshore detention in the face of years of criticism. A growing body of work thus looks at the language the government uses when talking about refugees and asylum seekers. Atikan argues that the context of political debate has been slowly drained of humanitarian protection and has instead moved towards deterrence, border security and migration control. Human rights principles still appear in public policy, but they lose ground as governments increasingly portray migration as a question of border protection and public order. This change helps explain how strict asylum policies can expand even as governments declare their commitment to refugee protection. The portrayal of the government also shapes how the public perceives. According to Georgiou, refugees often find themselves visible in political and media debate without meaningful control over how their experiences are represented. In Australia, terms such as "queue jumpers" and ongoing mentions of border protection have played a role in shifting the public's perception of asylum seekers. They are increasingly viewed not as people seeking protection but through the eyes of irregular migration, border control and national security. These narratives do not only describe refugee movement; they frame how detention policies are understood and justified in public debate. While these studies have made

¹⁰ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011) 15–22, 129–167.

Gammeltoft-Hansen explains how states increasingly externalise migration control by extending border enforcement beyond their territorial boundaries through cooperation with third countries, carrier sanctions, visa regimes and other administrative mechanisms

¹¹ Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Publishing 2016); Jane McAdam and Fiona Chong, *Refugees: Why Seeking Asylum Is Legal and Australia's Policies Are Not* (NewSouth Publishing 2021); Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2018) 8 *Journal of Immigration, Asylum and Nationality Law* 23–39. These works demonstrate that Australia's offshore detention regime evolved incrementally through legislation, executive policy, bilateral agreements and administrative practice, while highlighting the resulting fragmentation of legal responsibility

important contributions, they are often studied in separate meaning. Refugee law explains the legal duties owed to asylum-seekers. Externalisation studies the process by which migration control has moved beyond nation-states to outsourcing Humanitarian responsibility to third countries. Research on government framing explains how public support for strict policies emerges. Less attention has been given to the relationship between these processes, and how they reinforce each other. Law is not separate from politics, and political ideologies do not stay outside legal institutions. Together they make up the manner in which refugee protection is understood, applied and lived. This paper extends these debates by arguing that understanding Australia's offshore detention regime requires a comparative study of the interaction between deterrence, government framing, externalisation and lost accountability. It introduces the concept of the socio-legal gap to describe the growing gap between the legal protections due under international refugee law and the lived realities of refugees detained within Australia's offshore detention system. Despite Australia continuing to recognise its international legal obligations, a combination of political narrative faced, deterrence-based policies, externalised detention and dispersed responsibility have created conditions in which long term detention and accusations of repeated human rights abuse continue with no accountability. By looking at these processes together, we can get a clearer sense of how detention has become normalised within Australia's refugee governance system and build the basis for the legal analysis that follows.

International Legal Framework:

Australia's role in the international refugee system must be analysed within its history as a settler-colonial state and a contemporary society influenced by migration. The British colonisation began in 1788 on territories already inhabited and ruled by Aboriginal and Torres Strait Islander peoples. Later migration from Europe, Asia, the Middle East, Africa, and the Pacific contributed to the establishment of current Australia as a multicultural society. This context does not necessarily dictate the legal status of refugees, although it emphasises the significant difference between Australia's migratory history and its stringent asylum regulations. Contemporary Australia was established via the migration and settlement of individuals; yet, entrance to its territory is currently regulated by a clear differentiation between sanctioned migration and unanticipated asylum requests.

I. The Refugee Convention and Australia's obligations:

Australia signed the 1951 Convention Relating to the Status of Refugees on 22 January 1954, with the Convention being effective in Australia from 22 April 1954. It then signed the 1967 Protocol Relating to the Status of Refugees on 13 December 1973. The Protocol removed the initial time frame and geographic restraints of the Convention, providing its protective framework to extend to refugees beyond Europe. By endorsing these instruments, Australia assumed legal obligations towards individuals who fulfil the Convention's criteria of a refugee. These responsibilities include recognising refugee status par with the Convention, implementing its provisions without discrimination, making sure basic standards of treatment, and obeying to the prohibition on refoulement. The Convention does not restrict Australia from regulating immigration or determining who may enter via its standard migration plan. Nonetheless, it restricts the manner in which such control can be used on individuals requesting protection. Australia's treaty obligations are well established at the international level upon the state agreeing to regulations by signing the

treaty and protocol. Their function inside Australian courts is restricted, as treaties do not instantly translate into local law. Parliament must enact legislation to incorporate treaty provisions before citizens may ordinarily invoke them as directly enforceable domestic rights. This difference does not give Australia immunity from its international obligations. A policy may be legitimate under domestic law yet nevertheless pose issues under international law.

II. Non-refoulement:

The fundamental guarantee of the Refugee Convention is the principle of non-refoulement. Article 33(1)¹² forbids a state from removing or sending a refugee to a location where their life or freedom would be under threat due to race, religion, nationality, affiliation with a specific social group, or political beliefs. The UNHCR states non-refoulement as the fundamental principle of the Convention¹³. The obligation pertains to the outcomes of governmental actions, rather than merely their formal characterisation. A state cannot and should not escape accountability simply by shifting its burden by removal as a transfer, interception, or offshore processing arrangement. The legal enquiry continues to whether the individual faces persecution or significant harm. This includes indirect refoulement, wherein an individual is sent to a nation that may then transfer them to a dangerous or a unsuitable location. It requires that states evaluate protection claims prior to removal, as the prohibition would be given useless if an individual could be deported without a thorough risk assessment. Human rights law offers broader meaning of non-refoulement. According to the Convention against Torture¹⁴ a person must not be extradited to a country where there are meaningful reasons to believe they would encounter torture. The ICCPR prohibits removal in cases where there is a genuine risk of arbitrary deprivation of life or cruel, inhumane, or degrading treatment. These rights extend even beyond the Refugee Convention, as they are not dependent upon the anticipated harm being linked to any of the five Convention grounds¹⁵. The Australian Government agrees that non-refoulement obligations may emerge under the ICCPR, CAT, and the Convention of the Rights of the Child.

III. Detention and human rights law:

Australia is obligated by the International Covenant on Civil and Political Rights, which it accepted on 13 August 1980. Article 9 ensures the right to liberty and restricts arbitrary arrest or detention. Immigration detention is not naturally unconstitutional under international law; nevertheless, it must be meaningful on a case-by-case basis. Automatic, lengthy, and indefinite detention that lacks meaningful examination may be deemed

¹² D'Angelo, E. F. (2009). Non-refoulement: the search for a consistent interpretation of Article 33. *Vand. J. Transnat'l L.*, 42, 279.

¹³ United Nations High Commissioner for Refugees (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)

¹⁴ Nowak, M., Birk, M., Monina, G. (Eds.). (2019). *The United Nations convention against torture and its optional protocol: a commentary*. Oxford University Press

¹⁵ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007)

arbitrary¹⁶, even if approved by domestic law. Article 10 requires that all individuals deprived of liberty must be treated with humanity and respect for their dignity. Australia joined the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 8 August 1989. The Convention Against Torture (CAT) forbids torture and imposes obligations on states to avert cruel, inhuman, or degrading treatment. These obligations pertain not only to intentional physical abuse but also to the conditions of confinement, failures to safeguard detainees against violence, and severe neglect when state authorities are aware, or ought to be aware, of the risk¹⁷. The status of children is regulated by the Convention on the Rights of the Child, which Australia accepted on 17 December 1990. The CRC mandates that the best interests of the child be regarded as a paramount factor. Detention of a child must be legitimate, utilised just as a last resort, and imposed for the briefest suitable duration. Children must be safeguarded from violence, abuse, and detrimental treatment, irrespective of their country or immigration status¹⁸. These treaties pertain to refugees and asylum seekers as individuals, irrespective of their formal admission as members of the Australian society. Their migration status does not remove the rights to liberty, humane treatment, protection from torture and special protection as children.

IV. Responsibility beyond Australian territory:

Offshore processing raises the enquiry of whether Australia's obligations end at the transfer of an individual beyond its borders. International duty is not just contingent upon the geographical location of the detention facility. Obligations for human rights may persist when a state exerts authority, control, or significant influence over an individual or the system in which that individual is detained¹⁹. A state cannot unilaterally absolve itself of its responsibilities by delegating to another government or a private contractor. The allocation of responsibilities among states may influence which entity is accountable for a certain action, although it does not establish a legal void in which no state has responsibility. When a state formulates a policy, funds its adoption, organises transfers, or maintains authority over critical choices, its accountability should be evaluated based on those acts rather than solely on territorial considerations²⁰. This principle is fundamental to

¹⁶ United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc CCPR/C/GC/35 (16 December 2014), paras 11–18

¹⁷ United Nations Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008), paras 15–18

¹⁸ Chokloikaew, C. (2008). Section Two: Article 6 of the CRC and New York State Law. NY City L. Rev., 12, 487

¹⁹ United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), paras 10–12; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, para 111

²⁰ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries, UN Doc A/56/10 (2001), arts 4, 5, 8 and 16; Violeta Moreno-Lax and Mariagiulia Giuffr , 'The Rise of Consensual Containment: From

the subsequent analysis. Australia's international obligations stem from the Refugee Convention, the 1967 Protocol, and the human rights treaties to which it is a signatory. They include safeguards against refoulement, arbitrary detention, torture, inhumane treatment, and injury to minors. These responsibilities establish the legal standard to analyse the development of Australia's offshore detention system, characterised by the division of control, responsibility, and accountability across borders.

Australia's Offshore Detention Regime: The Evolution of Externalised Border Control:

Australia has always been a country of immigrants. Successive waves of migration have augmented the country's demographic, economic and cultural development since European settlement in 1788. In the post-World War II era, Australia promoted immigration to boost national development with the slogan "Populate or Perish" and welcomed millions of migrants from Europe before broadening its immigration programme to include Asia, the Middle East and Africa. Besides its migration programmes, Australia has been involved in international humanitarian resettlement programmes that accepted refugees displaced by conflicts in Europe and, later, from South-east Asia after the Vietnam War. The arrival of Indochinese refugees in the 1970s showed Australia's willingness to play its part in the international protection of refugees and helped establish Australia's reputation as a country that valued humanitarian resettlement²¹. However, this approach has gradually changed during the last decades of the 20th century. The growing number of boat arrivals of asylum seekers, who had come to the country on their own, began to turn refugee protection into a highly contested political issue. The formal humanitarian programme in Australia persisted, but governments increasingly distinguished between refugees selected as part of overseas resettlement programmes and asylum seekers arriving without prior authorisation. The public debate moved from humanitarian protection to border control, sovereignty and irregular migration. Refugees arriving by sea were no longer viewed primarily as people needing protection but increasingly as a challenge to Australia's migration system. The defining political turning point was the 2001 Tampa Affair²². The Norwegian cargo ship MV Tampa picked up over 400 asylum seekers from a distressed vessel in the Indian Ocean. The Australian government refused entry to the rescued persons into Australian territory. The incident blew up into a constitutional and political nightmare over border sovereignty, refugee protection and who is the responsible authority. Instead of processing asylum claims on the Australian mainland, the government sent the rescued asylum seekers to Nauru under what became known as the Pacific Solution. This was a significant change from previous refugee policy. Rather than examining protection claims within Australia, government policy increasingly wanted to prevent asylum seekers from even reaching Australian

"Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019)

²¹ Klaus Neumann, *Refuge Australia: Australia's Humanitarian Record* (UNSW Press 2004); James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (Cambridge University Press 2002)

²² Mary Crock and Ben Saul, *Future Seekers II: Refugees and the Law in Australia* (Federation Press 2002) 51-72; Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2009) 18 *International Journal of Refugee Law* 696-721

territory. The Pacific Solution went beyond being a short-term response to the Tampa incident. It developed a new model of refugee governance based on externalisation²³. Instead of withdrawing from the Refugee Convention or abandoning international refugee law, Australia moved core parts of the asylum process outside its territorial borders. The offshore processing of asylum seekers arriving by boat meant they were transferred to facilities established outside mainland Australia, with the government saying it continued to fulfil its international legal obligations. In practice, externalisation became a way that migration control could be exercised with fewer legal and political consequences attached to processing asylum seekers within Australia itself. Central to this policy was the offshore processing centres established on Nauru and later on Manus Island in Papua New Guinea and the increasing use of Christmas Island within Australia's migration control architecture. Geographically they were outside of mainland Australia but intimately associated with Australian migration policy. Australia funded the construction and operation of the facilities, negotiated agreements with host governments, funded essential public services associated with offshore processing and exerted considerable influence over the administration of the detention regime. Detention centres were mostly run by private companies under contract. These included Australian companies such as Transfield Services (later Broadspectrum) and security providers such as Wilson Security. This made for a complicated administrative structure where the government authority and private management were closely intertwined. The Nauru Files are a collection of more than 2,000 leaked incident reports prepared by welfare providers, security personnel, teachers and child protection officers working within the Nauru Regional Processing Centre²⁴. They are one of the most significant sources documenting the practical operation of Australia's offshore detention regime. Unlike policy documents or official declarations by the government, these reports recorded events as they happened and provide valuable primary evidence of the day-to-day realities of refugees and asylum seekers held in offshore detention. They document a wide range of incidents including allegations of sexual assault, physical violence, self-harm, suicide attempts, deteriorating mental health and child protection concerns and as such they provide an important insight into the humanitarian fallout of Australia's externalised refugee governance. Figure 1 is an incident report describing allegations of sexual assault of a minor in the Nauru Regional Processing Centre. The report details the involvement of child protection staff, welfare providers and security personnel following the allegation and outlines the administrative processes followed when incidents affecting vulnerable children were reported.

²³ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011); Madeline Gleeson, *offshore: Behind the Wire on Manus and Nauru* (NewSouth Publishing 2016)

²⁴ Berger, D. (2016). Australia's torture of asylum seekers. *BMJ*, 354

Incident report from the Nauru Regional Processing Centre documenting allegations of sexual assault involving a minor. Source: The Nauru Files.

Figure 2 examines an individual incident report of a major incident involving a child who attempted to suicide after expressing distress and uncertainty about the continuing detention of the family in the processing center. The report shows the immediate intervention by teachers, welfare officers and case managers, and the severe psychological impact that prolonged uncertainty and detention could have on children living within the offshore detention environment. Taken together, the incident reports should not be viewed as isolated incidents but as current operational records that are part of a much larger body of evidence contained within the Nauru Files. Reports offer a direct insight into the lived realities of offshore detention and shows that issues relating to child welfare, psychological distress and personal safety were documented in the routine operation of the detention system itself. These reports serve to complement the legal and policy analysis that follows by demonstrating the practical implications of Australia's externalised refugee governance framework.

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Incident report from the Nauru Regional Processing Centre documenting a major incident involving a child who threatened self-harm. Source: The Nauru Files.

The selection of Nauru and Manus Island was no coincidence. Both states were starved of economic resources and became heavily reliant on Australian financial aid tied to offshore processing arrangements²⁵. The arrangement allowed Australia to have a detention regime outside its mainland while still exercising a lot of practical influence over how it was run. The day-to-day administration seemed to lie with the host governments and contracted service providers, but Australia's financial, political and administrative involvement was significant. This resulted in the development of an offshore system in which power was fragmented across a range of actors, while Australian migration objectives more broadly continued to shape the implementation of policy. Successive governments continued to expand the offshore detention regime. While individual governments took different tacks to control migration, the fundamental aim of stopping unauthorised arrivals by sea remained remarkably constant. The Pacific Solution was introduced by the Howard government after the Tampa affair. The Rudd Government dismantled parts of offshore processing, only to later reintroduce offshore arrangements in response to a renewed influx of boat arrivals. The Gillard government extended regional processing deals. The Abbott Government initiated Operation Sovereign Borders²⁶, which placed border enforcement under military command and adopted an explicit policy of interception and return of vessels seeking to reach Australia. The subsequent Turnbull and Morrison governments largely retained this deterrence-based framework, and the Albanese government has retained key elements of Australia's offshore migration architecture²⁷, despite changes in administrative practice. By the mid-2010s Australia's refugee policy had been fundamentally changed. Offshore detention was no longer a temporary measure to deal with a migration issue but a permanent precedent of Australia's border governance strategy. Australia sought to manage migration through offshore detention camps, regional agreements which do not align with international obligations rather than just through territorial exclusion. This shift represented a movement from a refugee protection model based on humanitarian obligations to one increasingly organised around deterrence, border management and the prevention of unauthorised entry. But the development of Australia's offshore detention regime cannot be understood only through legislative reforms and administrative arrangements. The long-term viability of deterrence-based policies also relied on the acceptance of such policies in the Australian political and public discourse. Governments did not simply deploy new border policies; they also redefined the language through which refugees and asylum seekers were understood. This chapter will thus investigate how government framing, political narratives and public perception helped to normalise offshore detention and externalised refugee governance.

²⁵ Entizami, A. (2017). Offshore Processing: Assessing the Success of Australia's Offshore Processing of Asylum Seekers in Terms of Policy Objectives (Doctoral dissertation, Flinders University, School of History and International Relations)

²⁶ Australian Government, *Operation Sovereign Borders*; Parliament of Australia, Parliamentary Library, *The Pacific Solution and Australia's Refugee Policy* (Research Paper)

²⁷ Brennan, F. (2022). The albanese reset: Stopping boats while treating onshore asylum seekers decently. *Eureka Street*, 32(21), 20-31

Government Framing, Externalisation and Human Rights:

Australia's offshore detention regime was overseen not just by legislation and administrative change but also through a shift in the way refugees and asylum seekers were portrayed in public and political dialogue. With increasingly restrictive border restrictions, the tone and phrases used to describe irregular migration shifted. Refugees coming by sea were increasingly cast as 'illegal arrivals', 'queue jumpers' and possible dangers to Australia's sovereignty rather than as people seeking sanctuary from persecution. The public debate moved away from humanitarian commitments over time, in favour of border security, deterrence and national control. In this context, offshore detention ceased to be regarded as an exceptional response to forced migration and was normalised as an acceptable instrument of migration governance. Political slogans had a significant part in cementing this change. The campaigns 'Stop the Boats' and 'No Way: You Will Not Make Australia Home'²⁸ reduced a complicated humanitarian issue to one of border protection. These messages were directed not only at home audiences but also to potential asylum seekers abroad. They had a function more than to prevent disastrous voyages on the ocean. They told him that whatever protection someone needed, coming by boat would never lead to settlement in Australia. These narratives were legitimated by repetition. As time went by, asylum seekers were more and more linked with irregularity, criminality and disruption, despite the fact that international refugee law acknowledges that for people escaping persecution the chance to get to another country through legal migration procedures is often minimal. The politics of border protection spoke more successfully to public awareness than did the law of refugee rights. Atikcan's notion of "frame drain"²⁹ especially helpful in understanding this process, revealing how humanitarian frames waned in political significance as discourses of sovereignty, deterrence and security came into their own. The Australian government has always justified offshore detention and externalised asylum processing on two grounds: the protection of Australia's borders and the prevention of deaths at sea. The perils of irregular marine excursions were certainly serious. Many asylum seekers came via the people-smuggling networks in overloaded and unseaworthy vessels, with many lives lost in the attempt to reach Australian land. Saving lives has become one of the principal moral arguments for ever-more-strict migration policy. But this rationale has been completely challenged. Critics argue a humanitarian purpose was sought through a policy which revealed thousands of refugees to long term incarceration, severe psychological anguish and conditions that have been repeatedly banned by medical specialists, United Nations agencies and international human rights organisations. The question, therefore, was not whether deaths at sea should be prevented, but whether lengthy offshore detention was a necessary and fair way of achieving that purpose. Externalisation importantly changed the meaning between Australian society and the refugee experience. People sent to detention were taken from the Australian mainland along with the human Consequences of custody

²⁸ Tazreiter, C. (2015). 'Stop the Boats!' Externalising the Borders of Australia and Imaginary Pathologies of Contagion. Tazreiter, C. (2015) "Stop the boats, 141-57

²⁹ Atikcan, E. Ö., Henrichsen, T., Roehrig, S. (2026). An Endogenous 'Refugee Crisis': Exploring Frame Drain and Emerging Conflicts in Migration Politics. JCMS: Journal of Common Market Studies

to processing centres in Nauru and Papua New Guinea. Geographic remoteness turned into political distance. Most Australians came to offshore detention through government announcements, election campaigns and media reporting rather than by direct observation. Day-to-day living within the detention centres was mostly inconspicuous, as attention focused on border control. The architecture of externalisation worked not just outside Australia's borders but also beyond the reach of ordinary public investigation. Responsibility seemed to be shared between host governments, commercial contractors and regional agreements, but the system relied on Australian financing, policy decisions and administrative oversight. Investigative media, legal campaigning and the experiences of ex-detainees began to expose what life was like inside the offshore processing centres. One of the more significant leaks was the Nauru Files, a collection of nearly 2,000 leaked incident reports about the conditions at the Nauru Regional Processing Centre. They also noted continued cases of child abuse, sexual abuse, physical abuse, self-harm, attempted suicide and serious mental health disorders. A comprehensive list of individual mistakes doesn't exist; rather, there are recurring themes of damage in a setting of prolonged limbo and open-ended detention. The official account of offshore detention as a neat, bureaucratic exercise became increasingly incongruent with accounts from within the centers. The findings of the medical report in the documents were particularly alarming. Medical professionals frequently noted that individuals were diagnosed with major depression, post-traumatic stress disorder, chronic anxiety, suicidal ideation, fatigue and hopelessness. Many of the detainees had endured war, torture, and/or persecution before coming to Australia. Rather than healing, detention prolonged existing trauma and created further psychological harm. Health feedback forms frequently noted a worsening of mental health tied to ambiguity rather than any concrete horizon for release. Time was a form of pain. Days, months and years passed without genuine clarity about resettlement, release or repatriation. The reports suggest that the mental decline was not only the after-effect of the persecution that preceded displacement but also the result of the detention system itself. As the incarceration continued, discontent was often expressed through protest, hunger strikes and violent disturbances. The riots at the Manus Island Regional Processing Centre in February 2014 are still among the most significant occurrences in the history of Australia's offshore detention policy³⁰. During this conflict, Iranian asylum seeker Reza Barati was killed after being attacked within the facility. His death became a symbol for the human lives lost because of outsourced imprisonment. Criminal actions have been conducted and persons directly involved in the assault have been convicted. The question of political and institutional accountability, however, remains open. More than a decade later, no Australian administration has admitted responsibility for the death of Reza While Australia remained central to the design, financing and maintenance of the offshore detention system, responsibility was dispersed across governments, contractors and local authorities, and accountability became increasingly difficult to pinpoint. Behrouz Boochani's memoir³¹, *No Friend but the Mountains*, is by no doubt the most relevant account of the lived experience of offshore confinement. Detention, Boochani writes from

³⁰ Tan, N. F. (2018). The Manus Island regional processing centre: a legal taxonomy. *European Journal of Migration and Law*, 20(4), 427-451

³¹ Behrouz Boochani, *No Friend but the Mountains: Writing from Manus Prison* (Picador 2018) Volume-XII, Issue-V

captivity on Manus Island, is not just a matter of being physically locked up, but a system that is meant to drain hope through uncertainty, repetition and the slow deterioration of personal identity. Waiting is a punishment slower than death. legal procedures are transformed into laws of control. people become administrative cases and a file number halted between countries that neither fully accept nor fully reject them. Boochani gives people who have mainly evaporated into the web of politics and office document file numbers and refugees are turned into inanimate objects. His perspective encourages readers to look at detention not only through law and policy documents but also through the lived experience of living under a system deliberately constructed around rules meant to protect the refugee. An interview with investigative journalist Ben Doherty during my research visit to Sydney further reinforced these themes³². Doherty's reporting on Australia's offshore detention regime, including the publication of the Nauru Files, greatly expanded public understanding of conditions within the processing centres. The conversation focused on the divergence between the Australian government's version of events and the facts presented in the articles published about Nauru and Manus Island; the political narrative used to depict refugees in the Australian media; and the cost-benefit analysis behind the billions of dollars spent on a detention regime still purportedly justified on the basis of deterrence. Doherty also touched upon the repercussions associated with publishing these articles. The spoke of his concerns about the surveillance of his communication and instances where he felt he was being pursued following the publication of the Nauru Files. These real or imagined experiences are indicative of the pressures associated with researching Australia's offshore detention regime, and difficulties associated with exposing systems that are deliberately hidden from public view. Equally significant was his observation that the refugee voice was largely excluded from the public debate. The public debate over offshore detention has primarily been concerned with border control, party politics, and national security, with little consideration given to the actual voices of those detained. Australia's offshore detention policy is thus more than a border control mechanism. It demonstrates how political discourse can reshape public perception, justify extreme policy responses and distance the community from the human impact of those policies. Refugees have come to be viewed more as a deterrent than as people in need of protection. outsourcing has enabled Australia to extend its detention beyond the country's physical borders, while dispersing accountability among multiple actors. Leaked government documents, eyewitness accounts, and investigative reporting have revealed a truth very different from what the Australian government publicly claims, demonstrating a system marked by long periods of limbo, worsening psychological conditions, and unanswered questions regarding accountability. The difference between Australia's legal obligations under international law and the reality on the ground for refugees has thus not occurred by chance, but is the result of a complex interaction between law, politics and practice. This widening divide is the foundation of the socio-legal divide that will be examined in the following chapter.

³² interview with Ben Doherty (investigative journalist, *The Guardian*), Sydney, Australia, April 2026

The Socio-Legal Gap:

Law exists to regulate society, to protect individuals and to provide certainty in situations of conflict, vulnerability and injustice. Essentially, the legal system is meant to give substance to rights, to promote human dignity and to resolve disputes in a way that promotes social order. Therefore, the society views the law not only as rules, but also as a means of protection, security and justice. However, legal rights do not always guarantee adequate protection. This article refers to the gap between the promise of the law and the reality of the law as the Socio-Legal Gap. The Socio-Legal Gap is the difference between the promise of legal protection and the lived experience of those the law is designed to protect. It occurs where the law formally recognizes rights and duties, yet the rights are not available, not enforceable or do not address the problems the right-holder faces. The law is still there. Courts are still operating. The procedures still exist. Legal institutions are active. But even though it seems legal, the person remains trapped in not knowing, unable to benefit from the security the law supposedly promises the result is that remedy is present but justice seems increasingly absent. This is certainly true of Australia's refugee and asylum seeker regime. International refugee law provides for the right to seek asylum and prohibits refoulement. Domestic legal procedures provide mechanisms for the review of asylum claims. Every stage of the process is controlled by statute. But availability of these legal procedures does not necessarily mean immediate protection. An asylum seeker who arrives by boat may spend weeks, months or even years in an offshore processing centre while their claim is examined. While in this state they are in a legal limbo. They are not completely protected or eliminated. They wait. It is this waiting time that shows the socio-legal gap in its deepest dimension. Waiting is often presented as a neutral administrative procedure; for the individual it is quite different. It is time without guarantee. Time without any real control of one's future. Legal procedures keep dragging on in the background forever, while decisions that determine life, family, safety and identity are kept in abeyance. a day we wait is a day we cannot get back. Time cannot be restored by subsequent recognition or compensation in law, as can property or economical loss. For refugee persons who have already endured persecution, violence, and forced migration, the state of uncertainty itself can be injurious. "The law may not necessarily wield its force only through the content of what it proclaims, but also in what is omitted from the law. This omission has been described as the failure of the relevant authority to state the outcome of the process, the ambiguity of the process, and the delay in delivering a definitive decision. This omission is more than the mere procedural gaps; it has socio-legal, psychological and human consequences.' They did not know whether they would be granted refugee status, or would be sent back to their country of origin. However, these people were neither without legal rights, nor subject to a lack of legal protection. Further, that silence was no less significant than the outcomes. This might take the form of an institutional practice such as Australia's offshore processing regime. Refugees were subjected to extended periods of detention, worsening mental conditions and uncertainty regarding their futures under a legal framework. Even though these rights existed in law, established in international treaties, and implemented through the legal bureaucracy, they did not provide security for their daily lives. The challenge here is not the absence of law, but the divide between the rule of law and the realities of refugee life. The socio-legal gap does not mean that we should ignore refugee law because international refugee law is still

the best available legal mechanism to protect refugees. Rather, it demonstrates that, although legal protection may be in place, it may still fail to alleviate suffering as politics, bureaucracy and institutional arrangements can make the law impotent. We cannot assess cooperation simply through studying laws. Law needs to do more than just exist; it has to make a difference. One such example is Australia's offshore detention policy. The law is in place. Legal proceedings continue. Refugee status determination remains pending. International commitments continue to be assured. However, for a number of refugees, they remained in limbo for years, psychologically deteriorating and held in detention, awaiting the conclusion of the legal processes. The law may have promised them protection, but for a great number of them, that promise is yet to be realized. The Socio-Legal Gap emerges in the space between legal promises and the lived reality. To understand this gap requires not asking whether there is a legal framework but, rather, whether the legal framework is effective in achieving its goals of protection. This question applies beyond Australia's refugee policies, opening up space for further reflection on the relationship between law, society and justice, whenever laws identify rights but do not deliver protection in reality. Where the law proceeds without end, and remains mute to the suffering of individuals, the Socio-Legal Gap defines.

Conclusion:

The Australian detention system is an example of how a state which is committed to the international refugee protection agreement can also build one of the world's most biased systems of offshore detention. The outsourcing of refugee detention, the externalization of offshore detention and the strategic planning of asylum seekers as threats to sovereignty and border integrity have increasingly transformed refugee protection from a humanitarian right into a system of exclusion. Modern policy has focused on deterrence, control of territory and political legitimacy, rather than dealing with displacement on the principles of the 1951 Refugee Convention. The central argument of this article is that the Australian refugee "crisis" is not a crisis of irregular migration but a crisis of accountability. Perhaps the biggest question that remains unanswered within Australia's offshore detention regime is not just where refugees are detained but who is legally and morally accountable for the consequences of those detention policies. The divide of responsibility between Australia and offshore processing states has generated a legal and political environment in which accountability is fragmented but the effects of detention are persistent. The diffusion of responsibility makes it more and more difficult to obtain a meaningful legal remedy. Never ending detention deteriorating mental health and the breach of basic human rights are not effectively addressed. Government framing has been crucial to sustaining this system. Refugees are increasingly represented within discourses of sovereignty, border protection and national security, constructing the asylum seeker as an outsider threatening the integrity of the state, rather than as an individual entitled to international protection. Such narratives have normalised exceptional legal measures which would otherwise be difficult to justify in a framework based on universal human rights. This public thinking thus goes from humanitarian protection to the questions of border control, politicising the legality of severe immigration laws. The study presented in this article further emphasises the appearance of what has been referred to as the Socio-Legal Gap: the widening gap between the existence of legal rights in international refugee law and the lived realities of contemporary refugee governance. There are still

international legal principles acknowledging the rights and dignity of refugees, but the reality for them has been eroded by legal interpretations, legal jurisdictional issues, and policies designed around deterrence. Thus, the law protecting refugees is less prohibited, but distorted, circumscribed and deployed to curtail the ambit of protection. One of the law's greatest weaknesses is its occasional inaction in the face of ongoing hardship. Australia is a historical enigma. There are narratives of sovereignty and territorial containment, yet the creation of the Australian state did not occur by way of traditional *jus soli*, but rather via the forced removal of Indigenous people. This contemporary framework of migration governance in which sovereignty remains a fundamental basis for exclusion is inconsistent with its historical origins and requires us to think more deeply about how state sovereignty, territorial authority and international humanitarian responsibilities are related. Ultimately, in thinking about refugee governance we cannot lose sight of its fundamental meaning, because refugees are humans first and foremost. The impetus behind international refugee law was not merely border management but to safeguard individuals fleeing persecution, violence or threats. Legal regimes lose their foundation if they serve as tools of deterrence rather than protection. This is therefore a significant case study for the international community to understand how legal commitments may stay legally formal, but become practically subverted by policies, politics and practice. For international refugee protection to remain valid in the 21st century, it must be practically effective. The humanitarian character of refugee law must be revitalised and accountability re-established. There has been a legal limbo about the who is responsible for violence against refugees and refugee deaths. Instead of clearly delineating lines of accountability, Australia's offshore detention regime distributed responsibility across the Australian Government, the Government of Nauru and private contractors operating detention facilities. This fragmented governance has resulted in ongoing legal battles regarding the assignment of responsibility, which is one of the defining challenges of externalised refugee governance. The uncertainty surrounding the legality of Australia's off-shore detention regime is illustrated in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (Goldenziel 2016). The case challenged Australia's involvement in the detention of asylum seekers on Nauru, arguing that the Commonwealth lacked the legal power to assist or endorse their detention. Ultimately, the High Court ruled Australia's engagement was lawful. The Court found that the statutory amendments empowered the Commonwealth to contribute to and assist with regional processing arrangements in Nauru. The ruling upheld the legality of Australia's involvement but also pointed to the piecemeal nature of offshore processing, with detention occurring under Nauruan law, despite significant Australian financial, administrative and policy involvement. The case lays bare the fractured responsibility for offshore detention across Australia and Nauru and, more broadly, the fractured accountability in Australia's externalised refugee governance. The real problem with refugee detention is not the absence of law, but the arbitrariness of the law that is supposed to protect. Refugee protection law is dynamic and dynamism is not neutral. It can be bent, re-interpreted and manipulated by those who know how to wield it whilst offering little defence to those it was meant to protect. If the law can be turned this way or that way so easily it is no longer protection at all. For this reason, refugee protection cannot be left to the discretion of policy, it must be codified as a rule, and enforced with strict and unambiguous penalties for its

breach. A question that policy debate always side steps. What is the purpose of detention camps? People do not flee persecution just to be imprisoned, watched and abused by the authorities of another state. Abuse is abuse, whatever the context in which it happens, whatever the excuses that are made for it and someone is always responsible even when systems are deliberately constructed, as in Australia, to distribute that responsibility across jurisdictions and contractors so that no one can be fingered. First and foremost, refugees are human beings, not criminals, yet many are treated worse than convicted criminals. Nobody just gets up and walks into unforeseen misery and insecurity. This kind of migration is not a matter of choice, but of desperation and necessity. To offer kindness to those who arrive seeking safety is not a choice or a courtesy; it is a basic duty, one that resonates in a country like Australia, founded on land where the principle of *jus soli* was never afforded the respect it deserved to its first peoples. Its silence is not neutral when the law is silent before this suffering. It's deafening noise. The real problem with refugee detention is not that there is no law, but that the law that is supposed to protect is arbitrary. The law of refugee protection is dynamic, and dynamism is not neutral. It can be bent, re-interpreted and manipulated by those who know how to wield it whilst offering little defense to those it was meant to protect. If the law can be turned this way or that way so easily it is no longer protection at all. For this reason, refugee protection cannot be left to the discretion of policy, it must be codified as a rule, and enforced with strict and unambiguous penalties for its breach. What are detention camps for? (Policy debate consistently sidesteps the question.) "People do not run away from persecution to be locked up, watched and abused by the authorities of another state. Abuse is abuse, whatever the context or whatever the justifications. Someone is always responsible, even if systems are deliberately designed to diffuse that responsibility across jurisdictions and contractors so that no one can be identified (as happens in Australia). First and foremost, refugees are human beings, not criminals, yet many are treated worse than convicted criminals. Nobody just gets up and walks into unforeseen misery and insecurity. This kind of migration is not a matter of choice, but of desperation and necessity. To offer kindness to those who arrive seeking safety is not a choice or a courtesy; it is a basic duty, one that resonates in a country like Australia, founded on land where the principle of *jus soli* was never afforded the respect it deserved to its first peoples. Its silence is not neutral when the law is silent before this suffering. It's deafening.

Competing Interests:

The author declares that there are no financial or non-financial competing interests related to this work.

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