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The Manus Island Regional Processing Centre: a legal taxonomy

Nikolas Feith Tan*

Abstract

This article considers the controversial cooperative migration control approach of extraterritorial asylum through a case study of the Manus Island Regional Processing Centre (RPC), in operation between 2012 and 2017. Rather than operating in a 'legal black hole', the RPC was the site of legal contestation, as refugees and their lawyers turned to various legal fora in an attempt to hold Australia, Papua New Guinea and private contractors responsible for violations of human rights law. The recent closure of the RPC, as a result of litigation in the Papua New Guinea Supreme Court, shows that just as States employ a broad range of deterrence policies, refugee lawyers have an emerging 'toolbox' at their disposal to challenge extraterritorial asylum policies. The Manus Island RPC experience holds lessons for future litigation on policies of extraterritorial asylum, presenting both opportunities and risks for policymakers and refugee lawyers alike.

Keywords

Extraterritorial asylum – extraterritorial processing – Australia – Papua New Guinea – litigation

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1 Introduction

In November 2017, the Manus Island Regional Processing Centre (RPC or Centre) was closed after five years of operation, following a landmark decision of the Papua New Guinea Supreme Court finding detention of asylum seekers and refugees there to be unconstitutional.¹ The Centre's closure marks the end of one central element of Operation Sovereign Borders, Australia's policy to prevent the arrival of asylum seekers by boat. While the 'deterrence paradigm' is deeply entrenched in the Pacific and unlikely to end any time soon, the Manus Island RPC provides important lessons for any future extraterritorial asylum processing policies in the Pacific and in Europe.²

Extraterritorial asylum is a topical instantiation of cooperation-based migration control, involving the transfer of an asylum seeker from the jurisdiction of a traditional asylum 'destination state' to the territory of a third 'partner State', often in the Global South, for the purposes of assessing their asylum claim or temporary protection. Extraterritorial asylum is not *per se* unlawful but does pose particular challenges to the traditional model of territorial asylum. However, international law does not explicitly grant an asylum seeker the right to enter a State of their choosing to apply for protection.³

¹ *Namah v Pato (Minister for Foreign Affairs and Immigrations) and ors.* [2016] PJSC 13 (26 April 2016).

² Gammeltoft-Hansen, T. and Tan, N. F., 2017. The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy. *Journal on Migration and Human Security* 5(1), pp. 28-65; Hirsch, A. L., 2017. The Borders Beyond the Border: Australia's Extraterritorial Migration Controls. *Refugee Survey Quarterly* 36(3) pp. 48-80.

³ UNHCR Executive Committee Conclusion No. 15 (XXX) (Refugees without an Asylum Country) (1979), para (h)(iii); Vedsted-Hansen, J. (1999). Non-admission policies and the right to protection: refugees' choice versus states' exclusion, in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, F. Nicholson and P. Twomey (Eds.), pp. 269-88, Cambridge University Press, Cambridge, United Kingdom, p. 273.

Rather, sovereignty allows control of entry and international law only prevents the return 'by any manner whatsoever' of a person to a real risk of persecution or serious human right violations.⁴

Extraterritorial asylum arrangements in the Pacific are generally viewed in the literature as high on violations and low on accountability.⁵ Scholarly work in this area has focused on the creation of 'zones of exception' or 'legal black holes' where asylum seekers are placed in terrain beyond the protection of the law;⁶ the grave risk of human rights violations in the context of extraterritorial asylum processing;⁷ and the lack of accountability mechanisms, notably a regional human rights instrument or court.⁸

⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 33(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Opened for signature 10 December 1984, 1486 UNTS 85 (entered into force 26 June 1987) art 3; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 art 3.

⁵ Carrera, S. and Guild, E. (2017). "Offshore processing of asylum applications Out of sight, out of mind? CEPS Commentary, 27 January 2017.

⁶ Koh, H. H., 1994. America's Offshore Refugee Camps. *University of Richmond Law Review* 29, p. 139; Noll, G., 2003. Visions of the exceptional: legal and theoretical issues raised by transit processing centres and protection zones. *European Journal of Migration and Law* 5(3), pp. 303-341; De Boer, T., 2014. Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection. *Journal of Refugee Studies* 28(1), pp. 118-134. See also Mann, I., 2018. Maritime Legal Black Holes: Migration and Rightlessness in International Law. *European Journal of International Law* 29(2) pp. 347-372, p. 349. Mann refers to the legal black hole as a metaphor denoting an 'absence of law...from where law is most badly needed'. Cf Gammeltoft-Hansen, T. (2011). *Access to Asylum: International refugee law and the globalisation of migration control*, Cambridge University Press, Cambridge, United Kingdom, p. 20.

⁷ Nethery, A. and Holman, R., 2016. Secrecy and human rights abuse in Australia's offshore immigration detention centres. *The International Journal of Human Rights* 20(7), pp 1018-1038, p. 1032. Nethery and Holman conclude there is 'substantial and incontrovertible evidence that the human rights outcomes of Australia's offshore detention centres are devastating'.

⁸ van Berlo, P., 2017. The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality. *Human Rights Law Review* 17(1) pp. 33-71, at p. 69; Tan, N. F. (2017). State responsibility and migration control: Australia's international deterrence model, in *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control*, T. Gammeltoft-Hansen and J. Vedsted-Hansen (Eds.), Routledge, New York, United States.

This article suggests that rather than operating beyond the law, the Manus Island RPC was a constantly contested legal site at national and international levels, spanning human rights law, international criminal law, constitutional law, tort, and business and human rights. Legal challenges to the Manus Island RPC signal that just as States employ a broad range of deterrence measures,⁹ refugee lawyers have a ‘toolbox’ of methods to challenge extraterritorial asylum policies. The relevance of this approach goes well beyond the Pacific: with extraterritorial asylum processing high on the political agenda in Europe,¹⁰ policymakers can expect a range of legal challenges to any future extraterritorial asylum approaches.

This article proceeds in four parts. First, the article explores previous proposals and practice on extraterritorial asylum, setting out three distinct approaches based on the relative roles of cooperating States. Second, a brief account of the operation of the Manus Island RPC between 2012 and 2017 is provided. Third, the article outlines the legal advocacy and litigation undertaken in relation to the RPC during this period, including the decision of the Papua New Guinea Supreme Court in *Namah v Pato*, which caused the

⁹ Frelick et al refer to a State ‘toolbox’ preventing asylum seekers, from reaching their territories and triggering international obligations. Frelick, B., Kysel, I. M. and Podkul, J., 2016. The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants. *Journal on Migration and Human Security* 4(4) p. 192. See further Gammeltoft-Hansen and Tan 2017, *supra* note 2, pp. 34-40.

¹⁰ Ghezelbash, D. (2018). *Refuge Lost: Asylum Law in an Interdependent World*, Cambridge University Press, Cambridge, United Kingdom, pp. 169-75.

Centre's closure.¹¹ Finally, the article sets out key lessons for litigation of future extraterritorial asylum arrangements.

2 Conceptualising Extraterritorial Asylum

2.1 *Proposals and Practice*

Extraterritorial asylum, in its many forms, has been proposed, and in some cases implemented, by various States for more than 30 years. The following provides a brief, and by no means exhaustive, overview of the various proposals. In 1986, Denmark put forward a draft United Nations General Assembly resolution for the establishment of 'regional United Nations processing centres administrating resettlement' and requested a study into the allocation of resettlement places according to States' gross domestic product (GDP).¹² The draft resolution never received the requisite support of other States and was abandoned.

Extraterritorial asylum as a form of migration control was first implemented by the United States in Guantanamo Bay, Cuba. In 1991, in response to the exodus of Haitian asylum seekers following the fall of 'Papa Doc' Duvalier, the United States began using Guantanamo Bay as an asylum processing centre. There, United States immigration officials assessed the claims of transferred asylum seekers. The United States exercises complete control and jurisdiction over Guantanamo Bay under a perpetual lease

¹¹ Constitution of the Independent State of Papua New Guinea, came into effect 16 September 1975 s 42; *Namah v Pato*, *supra* note 1.

¹² Mathew, P. and Harley, T. (2016). *Refugees, Regionalism and Responsibility*, Edward Elgar Publishing, Northampton, United States, p. 115.

agreement with Cuba.¹³ Under its Migrant Interdiction Program, the United States continues to intercept and transfer irregular migrants to Guantanamo Bay, on a small scale, to this day.¹⁴

In 1993, the Dutch government proposed the establishment of asylum processing centres near countries of origin. The concept was tabled in the Intergovernmental Consultation on Asylum, Refugees and Migration (IGC), but not taken up.¹⁵

In 1994, following the exodus of some 30,000 Cubans by boat, the United States embarked on its 'Safe Havens' program, under which thousands of Cubans were transferred to Guantanamo Bay and Howard Air Force Base in the United States-controlled area of the Panama Canal Zone, on a temporary basis.¹⁶ Rather than a focus on asylum *processing*, the Safe Havens program was focused on the provision of temporary protection for all irregular migrants irrespective of refugee status.¹⁷

In 2001, following the MV Tampa standoff, Australia began transferring asylum seekers arriving by boat to Nauru, and later Papua New Guinea. The Pacific Solution remained in place until 2007 and was restored in 2012 in its current form, Operation

¹³ Koh, *supra* note 6, p. 139.; Dastyari, A., 2015. *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay*, Cambridge University Press, Cambridge, United Kingdom.

¹⁴ According to Dastyari, for example, only 425 people were transferred to Guantánamo Bay for asylum processing between 1996 and 2014. The majority of those requiring protection are resettled in third countries, not the United States. *Ibid* p. 4. See further Ghezelbash 2018, *supra* note 10, pp, 103-110;

¹⁵ Noll 2003, *supra* note 6.

¹⁶ Ghezelbash 2018, *supra* note 10, p. 110; Koh, *supra* note 6, pp. 154-8.

¹⁷ Sartori, M. E., 2000. The Cuban Migration Dilemma: An Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens. *Georgetown Immigration Law Journal* 15, p. 319.

Sovereign Borders. Both iterations of the policy include the interception and transfer of asylum seekers bound for Australia to Nauru and Papua New Guinea, for the purposes of asylum processing.

In 2003, the United Kingdom's *New Vision for Refugees* proposed the establishment of both 'Regional Protection Areas' and 'Transit Processing Centres' for asylum seekers.¹⁸ The proposal included processing of asylum seekers in transit States, with refugees to be resettled by a quota system within the EU. Functionally, asylum seekers could either apply for asylum in Regional Protection Areas or be transferred to a Transit Processing Centre after arrival in the EU, presumably on the basis of the safe third country concept.¹⁹ At the 2003 European Council meeting, the proposal received insufficient support and was subsequently abandoned.

In 2004, the German and Italian interior ministers called for the establishment of asylum processing centres in North Africa.²⁰ The proposal envisioned the interception of irregular migrants crossing the Mediterranean and transfer to a partner State where a pre-screening procedure would occur. Rather than a full asylum procedure, this pre-screening would identify likely refugees for transfer to Europe, and likely other migrants for

¹⁸ Noll 2003, *supra* note 6, pp. 303-4.

¹⁹ McAdam, J., 2015. Extraterritorial processing in Europe. Kaldor Centre for International Refugee Law Policy Brief; Léonard, S. and Kaunert, C., 2016. The extra-territorial processing of asylum claims. *Forced Migration Review* 51, p. 48. Proposed partner states included Albania, Romania, Croatia, Russia, Turkey, Ukraine, Iran, Somalia and Morocco.

²⁰ Noll 2003, *supra* note 6; McAdam 2015, *supra* note 19, p. 4.

channelling into national immigration procedures. According to a Dutch advisory opinion, the concept was rejected without a formal examination.²¹

Since the European migrant and refugee crisis in 2015, extraterritorial asylum proposals – either on behalf of the EU or individual member States – have come thick and fast.²² Most notably, in March 2016 Greece began returning asylum seekers to Turkey on the basis of the safe third country or first country of asylum concept under the EU–Turkey Statement.²³ While relatively few people have been returned to Turkey, the operation of the Statement – coupled with containment on the Greek Aegean islands – has drastically reduced the number of arrivals in the EU.²⁴

In 2017, Austria’s Defence Minister recommended the ‘off-shoring of responsibility’ over refugees by setting up EU centres in third countries for processing asylum applications, with entry only taking place after a positive asylum decision.²⁵ Similarly, French President Macron called for the establishment of asylum ‘hotspots’ in North Africa

²¹ Netherlands Advisory Committee on Migration Affairs. 2010. External Processing: Conditions applying to the Processing of Asylum Applications outside the European Union. (Advisory Report No 32, 2010) p. 17

²² According to one scholar, ‘Politicians in the UK, France, Holland, Denmark, Austria and Belgium have advocated for an Australian-style approach’ to asylum since 2015. Ghezelbash, D, ‘Why Europe shouldn’t follow Australia’s lead on asylum seekers’ *The Conversation*, 27 March 2018, available at <https://theconversation.com/why-europe-shouldnt-follow-australias-lead-on-asylum-seekers-90304> accessed 5 April 2018.

²³ EU–Turkey statement, 18 March 2016, available at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> accessed 16 October 2018.

²⁴ As at 31 May 2018, 1630 people had been returned under the Statement, including 284 Syrians. UNHCR, Returns from Greece to Turkey, 31 May 2018, available at <https://data2.unhcr.org/es/documents/download/63916> accessed 2 October 2018.

²⁵ Carrera and Guild 2017, *supra* note 5.

as an extension of the EU hotspot approach.²⁶ More substantially, in August 2017, France, Germany, Italy, Spain, Niger, Chad, Libya and the EU agreed to explore the creation of asylum processing centres in Niger and Chad, and the resettlement of refugees in those two States in the EU.²⁷

In 2018, the Danish Socialdemokratiet party put forward a policy platform that proposes removing any asylum seeker arriving on Danish territory to a third country for the processing of their claim for international protection.²⁸ Most recently, the European Council has agreed to consider the introduction of ‘regional disembarkation platforms’ in third countries to filter irregular migrants intercepted in the Mediterranean. According to media reporting, the EU is considering Algeria, Egypt, Libya, Tunisia, Niger and Morocco as possible partners.²⁹

²⁶ The hotspot approach is a Union-member state hybrid method on the registration, identification and filtering of new arrivals into asylum and return procedures. See Danish Refugee Council. 2017. Fundamental Rights and the EU Hotspot Approach; BBC, ‘EU migrant crisis: France plans asylum ‘hotspots’ in Libya’, 27 July 2017, available at <http://www.bbc.com/news/world-europe-40738199> accessed 25 September 2017.

²⁷ Joint Statement, Addressing the Challenge of Migration and Asylum, Paris, 28 August 2017, p. 3; Al Jazeera, EU, African leaders back new plan over migrant crisis, 28 August 2017, available at <http://www.aljazeera.com/news/2017/08/eu-african-leaders-plan-migrant-crisis-170828193540666.html> accessed 25 September 2017.

²⁸ Retfærdig og realistisk: En udlændingepolitik, der samler Danmark, February 2018, available at <http://www.socialdemokratiet.dk/media/7011/en-udlaendingepolitik-der-samler-danmark.pdf> accessed 14 March 2018 (in Danish).

²⁹ European Council, Conclusions – 28 June 2018, Brussels, available at <http://www.consilium.europa.eu/media/35936/28-euco-final-conclusions-en.pdf> accessed 30 August 2018; European Commission, ‘Non-paper on regional disembarkation arrangements’, June 2018, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-regional-disembarkation-arrangements_en.pdf accessed 30 August 2018; Witschge, L, ‘European proposals to outsource asylum centres condemned’, *Al Jazeera*, 28 June 2018, available at <https://www.aljazeera.com/news/2018/06/european-proposals-outsource-asylum-centres-condemned-180627165710147.html> accessed 30 August 2018.

2.2 Three Models of Extraterritorial Asylum

The brief overview of the history of proposals and practice on extraterritorial asylum reveals some variation in the concept. Three forms of extraterritorial asylum are discernible, understood in terms of the roles and responsibilities of cooperating States.

First, extraterritorial asylum processing may be conceived of on the basis of *exclusive partner State jurisdiction*. Cooperation is largely focused on the transfer of asylum seekers from one State to another. After transfer, the partner State assumes complete responsibility for the asylum seeker, including the asylum procedure and reception conditions. The EU-Turkey Statement is a good example of this model, whereby Turkey assumes responsibility for asylum seekers returned from the Aegean islands on the basis of the safe third country concept.³⁰

Second, extraterritorial asylum may take place on the basis of *joint jurisdiction* between destination and partner State, characterised by a high level of destination State involvement in the reception or processing of asylum seekers. In such scenarios, jurisdiction of the destination State endures after transfer, creating a situation of joint or shared jurisdiction over asylum seekers. Of course, jurisdiction is a question of fact and may differ from the stated intentions of cooperating States. Despite the denials of the

³⁰ Similarly, an abortive 2011 people swap agreement between Australia and Malaysia left jurisdiction over transferred asylum seekers in Malaysia's hands alone. Foster, M., 2012. The implications of the failed 'Malaysian Solution': The Australian High Court and refugee responsibility sharing at international law. *Melbourne Journal of International Law* 13(1), pp. 1-29.

Australian government, the Manus Island RPC is an apt example of joint jurisdiction.³¹ In some contrast, some proposals in Europe explicitly acknowledge the jurisdiction of the destination State alongside that of the partner State.³²

Finally, in rare cases extraterritorial asylum may take place on the basis of *exclusive destination State jurisdiction*. Such a situation will only take place where the partner State's role is limited to offering the use of its territory to the destination State. However, in general the presence of asylum seekers in a State's territory will trigger jurisdiction, except where a territorial lease or military occupation, war or rebellion displaces the presumption.³³ For example, the United States' transfers to centres in Cuba and Panama, discussed above, took place under territorial leases granting exclusive control to the United States.

3 Operation of the Manus Island RPC 2012-17

The Manus Island RPC needs little introduction. Since 2001, the centre has been the site of detention and the processing of asylum seekers intercepted on their way to Australia and transferred to the Centre. The RPC was in operation in two iterations: between 2001 and

³¹ See *infra* 5.1.

³² Retfærdig og realistisk: En udlændingepolitik, der samler Danmark, February 2018, available at <http://www.socialdemokratiet.dk/media/7011/en-udlaendingepolitik-der-samler-danmark.pdf> accessed 14 March 2018 (in Danish).

³³ *Ilascu and Others v. Moldova and Russia* 48787/99, para 312; Wouters, K. and Den Heijer, M., 2010. The Marine I case: a comment. *International Journal of Refugee Law* 22(1), pp. 1-19, p. 11.

2007 (the Pacific Solution); and from 2012 to 2017 (Operation Sovereign Borders). This article deals only with the second iteration of the RPC.³⁴

Following the end of the Pacific Solution, the number of asylum seekers reaching Australia by boat each year increased from 148 in 2007 to 17,204 in 2012. During the same period, approximately 700 asylum seekers died at sea.³⁵ Against this backdrop, in August 2012, acting on the recommendations of an expert panel, the Australian government announced the reopening of the RPCs on Manus Island and Nauru as a 'necessary circuit breaker' to irregular migration to Australia.³⁶ Following the passage of legislation through the Australian parliament allowing asylum seekers arriving by boat to be transferred to 'regional processing countries',³⁷ Australia and Papua New Guinea signed a memorandum of understanding (MoU) providing for 'joint cooperation' in the transfer and *processing* of asylum seekers on Manus Island.³⁸

³⁴ For work on the Pacific Solution, see Magner, T., 2004. A less than 'Pacific' solution for asylum seekers in Australia. *International Journal of Refugee Law* 16(1), pp. 53-90; Penovic, T. and Dastyari, A., 2007. Boatloads of incongruity: the evolution of Australia's offshore processing regime. *Australian Journal of Human Rights* 13(1), pp. 33-61; Kneebone, S., 2006. The Pacific Plan: The Provision of 'Effective Protection'? *International Journal of Refugee Law* 18(3-4), pp. 696-721; Francis, A., 2008. Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing. *International Journal of Refugee Law* 20(2), pp. 273-313.

³⁵ Australian Border Deaths Database, available at <http://artsonline.monash.edu.au/thebordercrossingobservatory/researchoutputs/australian-border-deaths-database/> accessed 31 May 2018. See further Davies, S. and Reilly, A., 'Factcheck: Have More than 1000 Asylum Seekers Died at Sea under Labor?' *The Conversation*, 23 July 2013, available at <http://theconversation.com/factcheck-have-more-than-1000-asylum-seekers-died-at-sea-under-labor-16221> accessed 31 May 2018.

³⁶ Houston, A., 2012. Report of the expert panel on asylum seekers, Australian Government, p. 47.

³⁷ Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012.

³⁸ Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues (signed and entered into force 8 September 2012).

In November 2012, the transfer of asylum seekers intercepted by Australian authorities to Papua New Guinea began. The RPC operated as a closed detention centre at Lombrum navy base, on Los Negros Island, immediately adjacent to Manus Island, holding as many as 1300 asylum seeker and refugees at its peak. The first arriving asylum seekers included women and children, but due to inadequate conditions, by July 2013, only men were detained at the RPC.³⁹ In July 2013, Australia and Papua New Guinea signed the Regional Resettlement Arrangement, an overarching framework providing for the processing of asylum claims and, crucially, the *settlement* of refugees in Papua New Guinea.⁴⁰ The Agreement states that ‘the missing element in current regional processing arrangements involving Australia is the absence of a final destination for proven refugees for permanent resettlement’.⁴¹

In November 2013, Papua New Guinea authorities began handing down initial asylum decisions, but final status determinations were not forthcoming until the middle of

³⁹ ‘Children Removed from Manus Asylum Centre’, *SBS News*, 4 July 2013, available at <http://www.sbs.com.au/news/article/2013/07/04/children-removed-manus-asylum-centre> accessed 31 May 2018; Dastyari, A. and O’Sullivan, M., 2016. Not for Export: The Failure of Australia’s Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah. *Monash University Law Review* 42(4), pp. 308-338, p. 317; Gleeson, M. (2016). *Offshore: Behind the wire on Manus and Nauru*, NewSouth, Sydney, Australia, pp. 50-56.

⁴⁰ Regional Resettlement Arrangement between Australia and Papua New Guinea (signed and entered into force 19 July 2013); Glazebrook, D., 2014. Papua New Guinea’s refugee track record and its obligations under the 2013 Regional Resettlement Arrangement with Australia (SSGM discussion paper 2014/3, 2014). In support of this Agreement, the states signed a further MoU in August 2013 that superseded the 2012 MoU. See Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues (signed and entered into force 6 August 2013).

⁴¹ Regional Resettlement Arrangement between Australia and Papua New Guinea (signed and entered into force 19 July 2013) art 6.

2015, almost two-and-a-half years after the arrival of the first asylum seekers.⁴² At the time of the RPC's reopening, Papua New Guinea lacked an appropriate legal framework, with no regulations transposing Article 1A(2) of the 1951 Convention on the Status of Refugees (1951 Convention)⁴³ into national law, and no regulations governing the asylum procedure.

In February 2014, a riot at the Manus Island RPC led to the death of one asylum seeker, killed by a G4S staff member and another local man, and injuries to dozens of other asylum seekers. While clear information on the riot has been difficult to access, it seems that asylum seekers protesting their detention were attacked *inside* the RPC compound. The riot was the subject of multiple Australian and Papua New Guinean government inquiries.⁴⁴

In April 2016, the Supreme Court of Papua New Guinea held that detention of asylum seekers under the bilateral arrangement breached the right to liberty set out in the constitution in *Namah v Pato*. Acknowledging the cooperation element of the policy, the Court ordered both the Australian and Papua New Guinean governments to end the detention of asylum seekers and refugees at the Manus Island RPC.⁴⁵

⁴² Karlsen, E. (2016). Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources. (Law and Bills Digest Section, Australian Parliamentary Library) p. 9

⁴³ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

⁴⁴ Cornall, R., 2015. Review into the events of 16-18 February 2014 at the Manus Regional Processing Centre, 23 May 2014; Senate Legal and Constitutional Affairs References Committee, 2015. Incident at the Manus Island Detention Centre from 16 February to 18 February 2014.

⁴⁵ *Namah v Pato*, *supra* note 1, para 74.

In November 2016, the United States agreed to resettle refugees from Papua New Guinea and Nauru, apparently in exchange for Australia resettling refugees from Costa Rica.⁴⁶ The agreement does not oblige the United States to resettle refugees, but rather to screen refugees in the RPCs for the United States resettlement program. At time of writing, 361 refugees had been resettled under this agreement.⁴⁷ A further few dozen refugees have been successfully settled in Papua New Guinea under the Regional Resettlement Arrangement.

On 31 October 2017, the RPC was formally closed and those detained were transferred to transit accommodation centres. Presently, 589 refugees remain in Papua New Guinea without a durable solution.⁴⁸

4 Legal Challenges to the Manus Island RPC

Historically, refugee litigation was predominantly focused on the 1951 Convention through the avenues of domestic courts. Moreover, legal challenges were particularly focused on the application of the inclusion and exclusion clauses under Article 1A and 1F, and the principle of *non-refoulement* contained in Article 33(1) of the Convention.⁴⁹

⁴⁶ McConnachie, K., 2017. Refugee Protection and the Art of the Deal. *Journal of Human Rights Practice* 9(2), pp. 190-196.

⁴⁷ *Asylum Insight* statistics, available at <https://www.asyluminsight.com/#/statistics/> accessed 16 October 2018.

⁴⁸ There are three internationally recognised durable solutions for refugees: resettlement, local integration and voluntary repatriation. Refugee Council of Australia, 'Operation Sovereign Borders and offshore processing statistics', available at <https://www.refugeecouncil.org.au/getfacts/statistics/operation-sovereign-borders-offshore-detention-statistics/> accessed 7 June 2018.

⁴⁹ See Gammeltoft-Hansen in this special issue.

Since the 1990s the human rights law paradigm within refugee law has led to both normative developments in refugee protection and the uptake of regional and international human rights law mechanisms for defending the rights of asylum seekers and refugees.⁵⁰ This affinity is under pressure, however, as human rights treaty bodies risk the perception or reality of an over-representation of asylum cases.⁵¹

In the Pacific, and perhaps elsewhere, the inadequacy of the human rights law paradigm in responding to extraterritorial asylum is giving rise to a new legal approach to litigating refugee rights through *multiple avenues across diverse legal orders and actors*.⁵² The Manus Island RPC was almost constantly the object of legal pressure and litigation in national and international courts and other fora. These legal strategies, explored in detail below, auger a new approach to litigating refugee rights.⁵³

⁵⁰ Lambert, H. (2009). International refugee law: dominant and emerging approaches, in *Routledge Handbook of International Law*, D. Armstrong (Ed.), pp. 344-354, Routledge, New York, United States, p. 348; Hathaway, J. C. (2005). *The Rights of Refugees under International Law*. Cambridge University Press, Cambridge, United Kingdom pp. 75-152; Gorlick, B., 2000. Human rights and refugees: enhancing protection through international human rights law. *Nordic Journal of International Law* 69(2), pp. 117-177; Costello, C., 2012. Courting access to asylum in Europe: recent supranational jurisprudence explored. *Human Rights Law Review* 12(2), pp. 287-339; Harvey, C., 2015. Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law. *Refugee Survey Quarterly* 34(1), pp. 43-60. Cf Chetail, V. (2014). Are refugee rights human rights? An unorthodox questioning of the relations between refugee law and human rights law, in *Human Rights and Immigration* Ruth Rubio-Marín (Ed.) pp. 19-72, Oxford University Press, Oxford, United Kingdom, p. 22.

⁵¹ Non-refoulement claims are the single most common complaint raised in all UN treaty bodies' communications. Çali, B and Cunningham, S., A few steps forward, a few steps sideways and a few steps backwards: The CAT's revised and updated GC on Non-Refoulement, 20 March 2018, available at <https://www.ejiltalk.org/part-1-a-few-steps-forward-a-few-steps-sideways-and-a-few-steps-backwards-the-cats-revised-and-updated-gc-on-non-refoulement/> accessed 7 August 2018

⁵² On the development of asylum law in South-East Asia, see Jones, M. (2014). Moving beyond protection space: developing a law of asylum in South-East Asia, in *Refugee Protection and the Role of Law: Conflicting Identities* S. Kneebone, D. Stevens and L. Baldassar (Eds.) Routledge, New York, United States, p. 251.

⁵³ See *infra* 5.2.

4.1 *International Human Rights and Refugee Law*

Avenues for establishing responsibility for the conditions at the Manus Island RPC via human rights and refugee law bodies are limited. Although both Australia and Papua New Guinea are party to the 1951 Convention, international refugee law lacks a dedicated complaints mechanism, leaving this role to national judiciaries. The United Nations High Commission for Refugees (UNHCR) has no adjudication function, but did conduct monitoring visits to the RPC on the basis of its supervisory role under Article 35 of the 1951 Convention.⁵⁴ UNHCR has stated that the two countries have ‘shared and joint responsibility’ in meeting their obligations owed to asylum seekers at the RPC.⁵⁵

While both States are party to the ICCPR and CAT, Papua New Guinea has not acceded to optional protocols allowing for individual communications to their respective committees. The Committee Against Torture and Human Rights Committee, in their latest concluding observations on Australia, found that the RPC fell under Australian jurisdiction, discussed in depth below.⁵⁶ While Australia does allow for individual communications, interestingly, no applications were received by the committees from the Manus Island RPC. There are a number of possible reasons for this, including lack of awareness of the procedure; the difficulty of exhausting Australian domestic remedies

⁵⁴ Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267. See UNHCR, 2013. UNHCR Mission to Manus Island, Papua New Guinea 15-17 January 2013; UNHCR, 2013. UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013.

⁵⁵ Ibid.

⁵⁶ See *infra* 5.1. Committee Against Torture, 2014. Concluding observations on the fourth and fifth periodic reports of Australia. 26 November 2014; Human Rights Committee, 2017. Concluding observations on the sixth periodic report of Australia. 9 November 2017.

from Papua New Guinea; or an assumption that Australia would not respect committee views.⁵⁷

4.2 *International Criminal Law*

In October 2014, Australian politician Andrew Wilkie requested the Office of the Prosecutor at the International Criminal Court (ICC) to open an investigation into possible crimes against humanity at the Manus Island RPC *proprio motu*.⁵⁸ International criminal law, of course, concerns the responsibility of individuals, not States. The request claimed that conditions at the Manus Island RPC amounted to crimes against humanity in breach of Article 7 of the Rome Statute.⁵⁹ Similarly, in February 2017, the International Human Rights and Conflict Resolution Clinic of Stanford Law School and Global Legal Action Network (GLAN) put forward a communication to the ICC requesting an investigation into possible crimes against humanity in the Nauru and Manus Island RPCs.⁶⁰ While the ICC has so far not responded to this request, the invocation of international criminal law against Australian politicians for the treatment of asylum seekers offshore is a striking example of creative legal responses to extraterritorial asylum policies.

⁵⁷ Personal correspondence with Refugee Council of Australia.

⁵⁸ Andrew Wilkie MP, Letter to the International Criminal Court, 22 October 2014, <http://andrewwilkie.org/wp-content/uploads/2015/10/First-Letter-to-the-ICC.pdf> accessed 7 August 2018.

⁵⁹ Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998. Article 7 sets out a list of acts that amount to a crime against humanity 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.

⁶⁰ Global Legal Action Network (GLAN), Communiqué to the Office of the Prosecutor of the International Criminal Court, 14 February 2017, <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/02/Communiqu%C3%A9-to-Office-Prosecutor-IntlCrimCt-Art15RomeStat-14Feb2017.pdf> accessed 7 August 2018.

4.3 *Business and Human Rights*

In September 2014, G4S was the subject of a complaint to the Organisation for Economic Co-operation and Development (OECD) alleging that the private contractor breached the Guidelines for Multinational Enterprises. The Guidelines are non-binding principles for responsible business conduct developed by 42 State governments.⁶¹ Chapter IV of the Guidelines provides, in part, that businesses should:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.⁶²

G4S was responsible for management and security at the RPC between February 2013 and March 2014, the period in which the riot occurred. The Human Rights Law Centre and Rights and Accountability in Development (RAID) claimed that G4S contributed to the arbitrary and indefinite detention of asylum seekers at the RPC and failed to maintain basic human rights standards.⁶³ The complaint was rejected by Australian National Contact Points on the basis that G4S was 'not accountable for government policy...it is not

⁶¹ OECD Guidelines for Multinational Enterprises 2011 Edition p. 3.

⁶² OECD Guidelines for Multinational Enterprises 2011 Edition Chapter IV.

⁶³ Human Rights Law Centre (HRLC) and Rights and Accountability in International Development (RAID), Complaint concerning G4S Australia Pty Ltd, 23 September 2014, <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5a1b422d24a694106d9b4a4b/1511735861938/OECD+Guidelines+specific+instance+-+G4S.pdf> accessed 7 June 2018, pp. 27-30.

the role of the Australian National Contact Point to issue commentary, whether intended or otherwise, on government policies or law.’⁶⁴

4.4 Australian Domestic Law

Australian domestic courts, both state and federal, were also the site of legal challenges to the Manus Island RPC. In the June 2014 case of *Plaintiff S156/2013 v. The Minister for Immigration and Border Protection & Anor*, the High Court of Australia dismissed an application of an asylum seeker who had applied for protection in Australia but been transferred to the Manus Island RPC pursuant to the bilateral MoU. The plaintiff claimed that recently introduced provisions of the *Migration Act 1958* empowering the immigration minister to designate a country a regional processing country where he or she thinks that it is in the national interest went beyond the aliens power contained in section 51(xix) of the Australian Constitution. The plaintiff argued that while the aliens power encompasses the expulsion or deportation of non-citizens, removal was disproportionate to this head of power as it had the practical effect of subjecting him to indefinite detention in the RPC.⁶⁵ The Court unanimously dismissed the claim, finding that the plaintiff’s removal sat squarely within the Aliens power provided by the Constitution.

Furthermore, a class action on behalf of asylum seekers detained at the Manus Island RPC claimed that the Australian government, G4S and Transfield Service failed to exercise their duty of care over asylum seekers detained between 2012 and 2016. The common law

⁶⁴ Statement by the Australian National Contact Point Specific Instance – G4S Australia Pty Ltd, 10 June 2015, available at https://www.oecdwatch.org/cases/Case_342 accessed 7 June 2018.

⁶⁵ *Plaintiff S156/2013 v. The Minister for Immigration and Border Protection & Anor*. [2014] HCA 22, paras 22-38.

of tort establishes a non-delegable duty of care on the part of the Australian government for detained persons. Such a duty cannot be delegated to a private entity and requires the government to take reasonable care to avoid foreseeable harm to detainees.⁶⁶ The claimants argued that the Australian government and its contractors, were negligent in providing inadequate food, water, shelter and security at the RPC.⁶⁷ In June 2017, the Australian government agreed to settle for \$AUD70 million (45 million Euro), plus costs. In announcing the settlement, the Australian government emphasized that ‘settlement is not an admission of liability in any regard’, citing the need to avoid lengthy court proceedings. As of June 2018, according to the law firm representing the asylum seekers, 97 per cent of the settlement had been paid to the class action members.

4.5 Papua New Guinean Domestic Law

The decisive legal challenge to the Manus Island RPC came in the case of *Namah v Pato*, which centred around Section 42 of the Papua New Guinean Constitution.⁶⁸ The case was introduced in 2013, soon after the reopening of the RPC, but not decided until April 2016. Section 42 sets out the right to liberty, providing ‘no person shall be deprived of his

⁶⁶ Legal and Constitutional Affairs References Committee, Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre, 21 April 2017, p. 150

⁶⁷ Younger, E., ‘Manus Island: Why asylum seekers sued the Commonwealth’, *Australian Broadcasting Corporation*, 21 June 2017, available at <http://www.abc.net.au/news/2017-06-14/manus-island-why-are-asylum-seekers-suing-the-commonwealth/8610482> accessed 6 June 2018; Akerman, P., Manus Island Class Action Settled by Government, *The Australian*, 14 June 2017, <https://www.theaustralian.com.au/national-affairs/immigration/manus-island-class-action-settled/news-story/efc8d2d274442459f3d90343f16d01c3> accessed 6 June 2018.

⁶⁸ For an excellent overview of the case, see Dastyari and O'Sullivan 2017, *supra* note 39.

personal liberty', except in defined, limited circumstances. Article 42(1)(g) sets out one of eight exceptions to the right to liberty:

for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion ... of a person from Papua New Guinea.

The Court found that detention at the Manus Island RPC did not fall under the Article 42(1)(g) exception as the asylum seekers had 'no intention of entering or remaining in Papua New Guinea. Their destination was and continues to be Australia.'⁶⁹

A legislative amendment inserted in 2014 was designed to preclude challenges like that taken up in *Namah v Pato*. Article 42(1)(ga) thus provides an exception to the right to liberty:

for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organisation...

The Court struck down Article 42(1)(ga) on the basis that the Papua New Guinean government failed to demonstrate how the amendment was 'reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind'.⁷⁰

⁶⁹ *Namah v Pato*, *supra* note 1, para 39.

⁷⁰ PNG Constitution s 38(1)(b); *Ibid.* para 54.

The Court thus held that detention of asylum seekers at the Manus Island RPC was unconstitutional and ordered that:

Both the Australian and Papua New Guinea governments shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees [sic] constitutional and human rights.⁷¹

Namah v Pato represents an important defence of the right to liberty in the context of extraterritorial asylum processing. Moreover, the decision comes from a somewhat surprising source: rather than the courts of the destination State, or a human rights treaty body, it is the partner country's judiciary that provides protection of refugee rights.⁷² The decision from the Supreme Court was unexpected due to refugee lawyers' preoccupation with destination State responsibility, too often overlooking partner State responsibility and corollary avenues for accountability.⁷³

⁷¹ *Namah v Pato*, *supra* note 1, para 74.

⁷² As Dastyari and O'Sullivan note 'In an era when asylum is becoming increasingly politicised, the decision also illustrates the potential role of courts in providing judicial protection of the rights of asylum seekers and refugees and highlights the power of the law to constrain executive action'. Dastyari and O'Sullivan 2017, *supra* note 39, p. 325.

⁷³ See Gammeltoft-Hansen in this special issue.

5 The Future of Extraterritorial Asylum Litigation

Just as States employ a toolbox approach to migration control,⁷⁴ refugee lawyers have a number of strategies at their disposal to challenge cooperative migration control policies. Of course, these efforts are rarely coordinated or unified, with various legal actors bringing complaints across multiple jurisdictions. For example, while Australian NGOs were active in pursuing legal challenges to the Manus Island RPC, litigation in Papua New Guinea was brought by the former leader of the opposition, Beldan Namah.

It is important to emphasise that most of these strategies were unsuccessful, as legislators moved nimbly to preclude adverse findings or complaint mechanisms lacked the jurisdiction or enforcement to establish accountability.⁷⁵ Nevertheless, legal contestation of the RPC points to a number of risks and opportunities for future legal challenges to extraterritorial asylum. The following section addresses three key lessons that emerge from the Manus Island RPC: developments in extraterritorial jurisdiction; multiple avenues of legal challenge; and risks associated with strategic litigation in this area.

5.1 *Developments in Extraterritorial Jurisdiction*

Australia's revival of the Manus Island RPC was, in part, predicated on the claim that the Centre was the exclusive responsibility of the Papua New Guinea government on the basis

⁷⁴ Frelick *et al*, *supra* note 9.

⁷⁵ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) HCA 1 (High Court of Australia); *Namah v Pato*, *supra* note 1. See further Dastyari and O'Sullivan 2017, *supra* note 39, p. 320

of territorial jurisdiction. This was spelled out in the Regional Resettlement Arrangement and subsequent Australian government statements.⁷⁶ Such an approach to jurisdiction was technically defensible on a strict reading of the tests for extraterritorial jurisdiction.⁷⁷ However, the UN treaty bodies have assessed Australia's extraterritorial jurisdiction differently, adopting a functional approach to the triggering of obligations at the RPC.

Extraterritorial jurisdiction on the basis of control over *persons* generally requires a high level of physical power over an individual, and has been found in relation to inter alia abduction;⁷⁸ unlawful killing by State agents;⁷⁹ and detention.⁸⁰ As Taylor argued in relation to less direct forms of migration control cooperation: 'it seems highly unlikely that an individual would be regarded as being subject to the effective control of a State unless an agent of that State is exercising some kind of coercive power over that person.'⁸¹ As Australia did not exercise direct physical control over the asylum seekers detained in the Manus Island RPC, instead leaving responsibility for the Centre to Papua New Guinean authorities and devolving day-to-day operations to private contractors, the question of extraterritorial jurisdiction was not clearcut.⁸²

⁷⁶ Regional Resettlement Arrangement between Australia and Papua New Guinea (signed and entered into force 19 July 2013) art 4.

⁷⁷ On the scope of extraterritorial jurisdiction, see Milanovic, M., 2008. From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties. *Human Rights Law Review* 8(3), pp. 411-448; Gammeltoft-Hansen 2011, *supra* note 6, pp. 100-157.

⁷⁸ *Lopez Burgos v. Uruguay* 52/1979; *Lilian Celiberti de Casariego v. Uruguay* 56/1979.

⁷⁹ *Isaak v Turkey* 44587/98; *Solomou and others v Turkey* 36832/97. See also *Pad and others v Turkey* 60167/00.

⁸⁰ *Al-Skeini v. United Kingdom* 55721/07; *Al-Saadoon and Mufdhi v. United Kingdom* 61498/08.

⁸¹ Taylor, S., 2015. Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and PNG: All Care But No Responsibility? *University of New South Wales Law Journal* 33(2), pp. 337-359, p. 350.

⁸² On the question of extraterritorial jurisdiction in the Nauru RPC, see van Berlo, *supra* note 8, pp. 49-56.

Extraterritorial jurisdiction on the basis of control over *territory* requires a high level of authority over a specific area outside sovereign territory. Jurisdiction on this basis has been found in situations of military occupation and control over an area by armed forces.⁸³ While the United States exercises ‘complete jurisdiction and control over’ the Guantanamo Bay naval base in Cuba, amounting to *de facto* sovereignty, Australian control over the Manus Island RPC site was far more limited. Under the bilateral agreements, Papua New Guinea retained authority and control over the territory on which the RPC was located. Papua New Guinean authorities were involved in the day-to-day operations of the RPC, including its management and undertaking asylum procedures.

The Human Rights Committee and Committee Against Torture adopted a more expansive approach to the question of extraterritorial jurisdiction in their concluding observations on Australia, creating a situation of *joint jurisdiction*.⁸⁴ The Committees put forward a *cumulative, functional* approach, in which a number of individual elements combined to trigger jurisdiction. In 2014, the Committee Against Torture found in relation to the Manus Island RPC:

All persons who are under the effective control of the State party, because *inter alia* they were transferred by the State party to centres run with its financial aid and

⁸³ *Loizidou v. Turkey* 15318/89; *Ilascu and Others v. Moldova and Russia*, *supra* note 33..

⁸⁴ See *supra* 2.2.

with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the Convention (arts. 2, 3 and 16).⁸⁵

In 2017, the Human Rights Committee similarly held:

the Committee recalls the “power or effective control” standard for jurisdiction laid out in its general comment 31 and considers that the significant levels of control and influence exercised by the State party over the operation of the offshore regional processing centres, including over its establishment, funding and service provided therein, amount to such effective control.⁸⁶

These brief, but vital, statements confirm Australia’s jurisdiction over the Manus Island RPC on four grounds: establishment of the RPC; transfer of the asylum seekers; funding; and choice of private contractors. The Committees do not state whether all these elements are required, or whether one would be sufficient to trigger jurisdiction.

The Committees employ a functional test based on an accumulation of factors. Gammeltoft-Hansen put forward the concept of a functional approach to extraterritorial human rights jurisdiction, arguing:

⁸⁵ Committee Against Torture, *supra* note 56, p. 6.

⁸⁶ Human Rights Committee, *supra* note 56, p. 7.

What matters is not a generalised test of personal or geographic control, but rather the specific power or authority assumed by the State acting extraterritorially in a given capacity.⁸⁷

Similarly, Lawson argues that power entails responsibility where there is a ‘direct and immediate link’ between the State and the individual.⁸⁸

The functional approach is already well-established in the Inter-American Human Rights System.⁸⁹ The Human Rights Committee has also placed emphasis on the *relationship* of authority and control exercised by the State over an individual.⁹⁰ In the European Court of Human Rights (ECtHR) case of *Al-Skeini v the United Kingdom*, the concurring opinion of Judge Bonello argued for a functional approach where:

Jurisdiction means no less and no more than “authority over” and “control of”. In relation to Convention obligations, jurisdiction is neither territorial nor extraterritorial: it ought to be functional...⁹¹

The UN Committees appear to conclude that Australian jurisdiction is established by virtue of its multifaceted *power and authority* over the men at the Manus RPC. While the

⁸⁷ Gammeltoft-Hansen 2011, *supra* note 6, p. 124.

⁸⁸ Lawson, R. (2004). Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights in *Extraterritorial Application of Human Rights Treaties*, F. Coomans and M. T. Kamminga (Eds) pp. 83-124, Intersentia, Antwerp, Belgium, pp. 86, 104.

⁸⁹ *Armando Alejandro Jr. and Others v. Cuba* (‘Brothers to the Rescue’) 11.589, para 25.

⁹⁰ *Lopez Burgos v. Uruguay*, *supra* note 78, para 12.2.

⁹¹ *Al-Skeini v. United Kingdom*, *supra* note 80, Concurring Opinion of Judge Bonello, para 12.

precise scope of the level of control required remains unclear, these findings are a clear shift toward a functional model of extraterritorial human rights jurisdiction based on accumulative factors that fall short of direct physical control. As far as I am aware, these observations are the first United Nations treaty body pronouncements on the test for jurisdiction in the context of extraterritorial asylum processing.

The importance of these findings are at least threefold. Firstly, the Committee Against Torture and Human Rights Committee establish that a destination State will hold jurisdiction over individuals it transfers to an asylum processing centre it establishes and funds, operated by private actors it contracts. This is an important message for European States considering emulation of Australia's approach, as all European States are also party to the ICCPR and CAT. Secondly, the Committees' observations open the door to individual complaints against destination States engaged in extraterritorial asylum processing. While Committee views are not binding, individual complaints are an influential way to encourage compliance with human rights law obligations applicable to asylum seekers and refugees.⁹² Thirdly, the Committees' finding of extraterritorial jurisdiction may influence future applications to the ECtHR, given the inherent relationship between regional and international human rights law.

⁹² Gorlick 2000, *supra* note 50; Costello, C., 2017. The United Nations Treaty Bodies: An Emerging Soft Enforcer of Refugee Law. Refugee Studies Conference, Beyond Crisis: Rethinking Refugee Studies. Oxford. 16 March 2017.

5.2 Multiple Avenues for Legal Challenge

Legal contestation around the Manus Island RPC reveals a number of avenues to challenge the legality of extraterritorial asylum processing. At the national level, the domestic courts of both destination and partner States can provide judicial protection of refugee rights. While the High Court of Australia is an obvious avenue to challenge extraterritorial asylum arrangements, with some history of success,⁹³ *Namah v Pato* shows that consideration should also be given to the national courts of partner States. In the context of current cooperation between Italy and Libya, a Tripoli court stopped the operation of a February 2017 bilateral MoU.⁹⁴ The decision was, however, overturned by the Libyan Supreme Court some months later.⁹⁵

Moreover, domestic legal orders offer multiple *avenues* for accountability. For example, the use of tort law to pursue financial damages for harms in extraterritorial asylum processing is a new and promising avenue. In common law jurisdictions, a non-delegable duty of care over asylum seekers in extraterritorial centres may be justiciable in the domestic courts of the destination State. The class action settlement in the Supreme Court of Victoria indicates the effectiveness of this approach, both in providing a

⁹³ *Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*. [2011] HCA 32, High Court of Australia. The Greek Appeal Committees have further held in two cases that the mere fact of transiting through Turkey does not create a sufficient connection with the country to allow return under the EU–Turkey Statement. 9th Appeals Committee, Decision 15602/2017, 29 Sep 2017; 11th Appeals Committee, Decision 14011/2017.

⁹⁴ Tripoli court blocks Serraj’s migrant deal with Italy: effect unclear, *Libya Herald*, 22 March 2017, available at <https://www.libyaherald.com/2017/03/22/tripoli-court-blocks-serrajs-migrant-deal-with-italy-effect-unclear/> accessed 7 June 2018.

⁹⁵ Supreme court overturns lower court ban on Libya-Italy migrant deal as Italian interior minister discusses issue with Fezzan mayors, *Libya Herald*, 26 August 2017, available at <https://www.libyaherald.com/2017/08/26/supreme-court-overturns-lower-court-ban-on-libya-italy-migrant-deal-as-italian-interior-minister-discusses-issue-with-fezzan-mayors/> accessed 7 June 2018.

pecuniary remedy for asylum seekers and refugees and in showing governments the potential financial burden of such arrangements.⁹⁶

Finally, challenging the role of other *actors*, such as private entities and individuals, may be effective in bringing pressure to bear on extraterritorial asylum arrangements. Complaints against Australian politicians to the ICC, for example, seem highly unlikely to succeed, but may increase political pressure on policymakers. Complaints against private companies may be effective in ‘naming and shaming’ those enterprises engaged in extraterritorial asylum processing.⁹⁷ A number of the private contractors involved in the Manus Island RPC did not retender following the expiration of their contracts, citing reputational damage.⁹⁸

5.3 *Risks, Opportunities and Unintended Consequences*

Thus far, this article has sought to demonstrate that rather than taking place in a ‘legal black hole’, the Manus Island RPC was a site of multiple and varied legal challenges. While the ‘toolbox’ approach of refugee lawyers is a positive development in challenging extraterritorial asylum processing, there are a number of risks inherent to litigation in this area.

⁹⁶ An asylum seeker who lost one eye in the February 2014 riots also settled with the Australian government.

⁹⁷ See, for example, the “No Business in Abuse” campaign, <https://www.nobusinessinabuse.org/>.

⁹⁸ Doherty, B. “Detention centre operator’s contract extended despite new owner’s objection”, *The Guardian*, 8 August 2016, available at <https://www.theguardian.com/australia-news/2016/aug/08/detention-centre-operators-contract-extended-despite-owners-objection> accessed 7 June 2018.

Firstly, of course, the possibility of challenging extraterritorial asylum policies in a range of fora should not be mistaken for guaranteeing an effective remedy for breaches of asylum seekers and refugees' rights in extraterritorial asylum processing. The bald truth is that Australia and Papua New Guinea operated an asylum detention centre for four years before the decisive intervention in *Namah v Pato*. Even after the decision was handed down, the RPC remained in operation for a further year-and-a-half before its ultimate closure.

Secondly, governments themselves adopt a range of strategies in dealing with litigation challenging asylum policy. Baumgärtel suggests that European governments seek to limit the impact of litigation in this area through legal argumentation in court; anticipatory measures; peer mobilization; and post-judgment positioning.⁹⁹ In the Pacific, similar tactics can be observed. The Australian government has made hasty legislative amendments to ward off impending cases challenging arrangements on Manus Island and Nauru.¹⁰⁰ Furthermore, the settling of cases avoids scrutiny in open court and the risk of public airing of allegations of violations in extraterritorial settings. Perhaps most importantly, however, governments increasingly see litigation as 'part of the game' in the arena of asylum policy.¹⁰¹ This suggests that States are willing to push the boundaries of

⁹⁹ Baumgärtel, M. (2018). 'Part of the Game': Government Strategies against European Litigation Concerning Migrant Rights, in *The Changing Practices of International Law*, T. Aalberts and T. Gammeltoft-Hansen (Eds.), Cambridge University Press, Cambridge, United Kingdom, pp. 103-128, p. 104.

¹⁰⁰ *Plaintiff M68/2015*, *supra* note 75.

¹⁰¹ Baumgärtel 2018, *supra* note 99, p. 104.

legality in crafting asylum policies, prepared to run the risk of subsequent curtailment by national or international judiciaries.

Thirdly, litigation risks unwanted results. By challenging extraterritorial asylum policies in court, ‘successes’ may lead to more creative, even extreme, State policies.¹⁰² In the Pacific context, the *M70/2011 v Minister for Immigration and Citizenship* case is illustrative. In that case, the High Court of Australia struck down a people-swap arrangement between Australia and Malaysia on the basis of inadequate legal guarantees for refugees in Malaysia.¹⁰³ The *M70* case immediately preceded the reopening of the RPCs on Manus Island and Nauru.¹⁰⁴ Relatedly, while the ECtHR in *Hirsi Jamaa and Others v. Italy* invalidated Italian pushbacks under a bilateral agreement with Libya,¹⁰⁵ current cooperation between Italy and Libya seeks to avoid the trigger of Italian jurisdiction through the use of ‘contactless control’ that stops short of physical control over individuals on the part of Italian agents.¹⁰⁶ This form of cooperation is the subject of a

¹⁰² Gammeltoft-Hansen, T. 2014. International Refugee Law and Refugee Policy: The Case of Deterrence Policies. *Journal of Refugee Studies* 27(4) pp. 574-595.

¹⁰³ See Foster 2012, *supra* note 30.

¹⁰⁴ According to Mann, ‘The trajectory of *M70/2011* provides an outstanding case study illustrating the strange way in which transnationalism defeats its own human rights commitments. The Australian High Court wrote what is perhaps the most powerful defense of the absolute obligations of human rights in the short history reviewed above. The decision seems to include profound articulations of the *ethics of conviction* of human rights. But with some diplomatic work, its prohibitions were found to leave significant opportunities for policymaking networks that would not violate the rules that the court set out.’ Mann, I., 2013. Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013. *Harvard International Law Journal* 54(2), pp. 315-91, p. 372.

¹⁰⁵ *Hirsi Jamaa and Others v. Italy* 27765/09.

¹⁰⁶ Moreno-Lax, V. and Giuffré, M., (2019). The Rise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Migratory Flow, in *Research Handbook on International Refugee Law*, S. Juss (Ed.), Edward Elgar (forthcoming).

recent application to the ECtHR.¹⁰⁷ The point here is that in the absence of a coordinated transnational litigation effort, well-intentioned legal challenges may spawn new deterrence policies.¹⁰⁸

6 Conclusion

Ultimately, the second iteration of the Manus Island RPC should be understood as a cautionary tale for policymakers. The RPC was successful in stemming the number of asylum seekers reaching Australia by boat, by making an example of those who had already arrived. In this sense, the Manus Island RPC was a classic and explicit deterrence policy, mistreating those who had already arrived in order to deter others from seeking to come. From the many legal challenges that followed, however, the Australian government suffered financial and reputational harm from the settlement of tort claims and criticism of United Nations human rights bodies. The Papua New Guinean government suffered legal and reputational damage by virtue of its detention policy being held unconstitutional and the spotlight shone on conditions in Manus Island.¹⁰⁹ Finally, private contractors working

¹⁰⁷ See Pijnenburg in this special issue. Global Legal Action Network. Legal Action Against Italy over its Coordination of Libyan Coast Guard Pull-backs Resulting in Migrant Deaths and Abuse. 8 May 2018, available at <http://www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse> accessed 7 June 2018.

¹⁰⁸ Gammeltoft-Hansen 2014, *supra* note 102, p. 588. Thus, 'We may have to concede that international refugee law has also had a secondary effect, unintentionally pushing a certain evolution in deterrence policies. Indeed, courts' opinions that establish extraterritorial obligations under carefully circumscribed conditions may in some situations provide an indirect road map for executives to develop next generation deterrence measures creatively.'

¹⁰⁹ Medhora, S., 'Papua New Guinea lacks resources to resettle all Manus Island refugees, warns PM', *The Guardian*, 3 March 2016, available at <https://www.theguardian.com/australia-news/2016/mar/03/papua-new-guinea-lacks-resources-to-resettle-all-manus-island-refugees-warns-pm> accessed 7 June 2018.

at the RPC suffered reputational and financial damage from their involvement in the Centre's operations.

In 1991, marking the 40th anniversary of the 1951 Refugee Convention, Aleinikoff noted that 'refugee lawyers must be human rights lawyers'.¹¹⁰ This statement, while undoubtedly still true, is incomplete to address contemporary cooperative migration control policies. Today, refugee lawyers must be *global* lawyers, giving due consideration to the responsibility of both destination and partner States engaged in extraterritorial asylum and examining opportunities for interventions in multiple avenues across diverse legal orders.

¹¹⁰ Aleinikoff, T. A., 1991. The Refugee Convention at Forty: Reflections on the IJRL Colloquium. *International Journal of Refugee Law* 3(3) pp. 617-25, p. 625.