International Journal of Refugee Law, 2024, **36**, 60–76
https://doi.org/10.1093/ijrl/eeae010
Advance access publication 27 April 2024
Article

OXFORD

The Gender- and Sexuality-Based Harms of Refugee Externalization: A Role for Human Rights Due Diligence

Anna Talbot,[*] Anthea Vogl,[†] and Sara Dehm[‡]

ABSTRACT

Refugee externalization arrangements are increasingly common in refugee-receiving global North States. Such arrangements have broad-ranging and significant human rights implications, especially (but not only) for refugee women and LGBTQI refugees who may be at increased risk of gender- or sexuality-based harm. This is particularly the case where refugees are placed in situations of risk or harm as a result of a 'sending' State's extraterritorial regime, or where domestic laws in receiving States outlaw certain practices such as pregnancy termination or same-sex sexual activity. There has been limited scholarly analysis of the gendered impacts of externalization policies, and States rarely take into account the gendered implications of externalization when implementing these policies. This article examines the possibilities and limits of international human rights law to protect refugees at risk of gender- and sexuality-based harms through a focus on States' positive due diligence obligations. While there is limited jurisprudence on the scope of such obligations in the context of refugee externalization, the article emphasizes that due diligence human rights obligations require sending States to adopt effective measures to protect people from unlawful discrimination and from cruel, inhuman or degrading treatment. Due diligence obligations also offer a vital accountability mechanism for violations in extraterritorial settings through their potential preventative, remedial, and visibility functions. Using the case study of Australia's extraterritorial asylum regime in the Pacific, the article argues that such obligations encompass identifying and addressing foreseeable risks of gender- and sexuality-based harm, both prior to forcibly transferring refugees abroad and on an ongoing basis. Further, it argues that the gender- and sexuality-based human rights impacts of Australia's externalization regime have immediate and urgent relevance as other States consider or implement similar policies.

* PhD candidate and Affiliate, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW Sydney, Australia. Email: anna.talbot@unsw.edu.au
† Associate Professor, Faculty of Law, University of Technology Sydney, Australia.
‡ Senior Lecturer, Faculty of Law, University of Technology Sydney, Australia.

© The Author(s) 2024. Published by Oxford University Press. All rights reserved. For commercial re-use, please contact reprints@oup.com for reprints and translation rights for reprints. All other permissions can be obtained through our RightsLink service via the Permissions link on the article page on our site—for further information please contact journals.permissions@oup.com.

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

1. INTRODUCTION

Refugee externalization arrangements are rightly critiqued for resulting in inferior protection options and increased risks of *refoulement* for refugees. These arrangements also have broad-ranging and significant human rights implications,[1] especially (but not only) for women and lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) refugees who may be at increased risk of violence due to their gender or sexual orientation and gender identity. This is particularly so where refugees are forcibly transferred to closed detention settings or otherwise placed in situations of risk or harm in so-called 'safe third countries'. Domestic laws that outlaw certain practices such as pregnancy termination or same-sex sexual activity in such States can increase risk. Yet, to date, there has been limited scholarship exploring the impacts of such externalization policies on women and LGBTQI refugees, and States rarely appear to take these risks seriously when implementing these policies.[2]

This article examines the possibilities and limits of international human rights law, and States' positive due diligence human rights obligations in particular, to protect refugees at risk of gender- and sexuality-based harms within externalization arrangements where refugees are forcibly transferred from one State to another. It emphasizes that the emerging, although still limited, jurisprudence on the scope of due diligence human rights obligations in the context of such externalization policies requires 'sending' States to adopt effective measures to protect people from unlawful discrimination and from cruel, inhuman or degrading treatment in extra-territorial settings.[3] In particular, the article argues that such obligations encompass identifying and addressing foreseeable risks of gender- and sexuality-based harm, both prior to forcibly transferring refugees abroad and on an ongoing basis. Extraterritorial due diligence obligations may also arise where sending State actions can foreseeably determine refugees' access to rights beyond that State's territorial borders and there is a special relationship of dependency, at least in relation to the right to life.[4] While the focus here is on women and LGBTQI refugees, the analysis could have relevance for broader migration externalization processes that have been adopted by some States.

State accountability for the harms arising from refugee externalization practices is indeed 'elusive'.[5] Rather than proposing greater attention to due diligence human rights obligations as a means to facilitate lawful externalization, this article emphasizes the potential for such obligations to be used to draw attention to specific foreseeable gender- and sexuality-based harms created or facilitated by externalization practices. The article suggests that the value of paying attention to due diligence human rights obligations is threefold. First, due diligence obligations can serve a preventative function, compelling States to identify foreseeable human rights violations and to take mitigating action prior to implementing any externalizing measures, including

1 See generally Bill Frelick, Ian M Kysel, and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal of Migration and Human Security 190.

2 This article uses the term 'refugees' to include asylum seekers and refugee claimants, in recognition of the declaratory nature of refugee status under the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention). Despite the limited academic research, civil society advocacy and human rights organizations have widely documented the harms of specific externalization practices for women, children, and LGBTQI refugees, and this work is drawn upon throughout the article.

3 Such due diligence obligations arise from key human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT). Given the specific focus of this article, the terminology of 'sending State' is used to refer to the State in which the asylum seeker arrives and seeks protection, and which is responsible for the transfer of the asylum seeker to a so-called 'safe third country' or 'receiving State'.

4 *AS v Italy*, UN doc CCPR/C/130/D/3042/2017 (4 November 2020) para 7.8.

5 Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 German Law Journal 311, 313.

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

avoiding such measures if adequate mitigation action is not possible. Secondly, due diligence obligations have a retrospective or remedial function when human rights violations occur, potentially facilitating refugee claim-making, legal action for redress, and interventions into the lawfulness of existing externalization measures. Thirdly, the individualized and context-dependent risk assessments required on the part of sending States to fulfil their due diligence human rights obligations at various points in time can function to expose the unique and differentiated harms of externalization for specific groups, such as women and LGBTQI refugees. Importantly, due diligence obligations cannot be legally outsourced or wilfully ignored by sending States. In emphasizing both the initial and the ongoing obligation on sending States to act diligently when implementing externalization policies, due diligence offers a vital accountability mechanism for violations that occur at the hands of either State or private actors in extraterritorial settings, including State-funded private contractors.[6]

Using the case study of Australia's extraterritorial asylum regime in the Pacific, the article demonstrates how due diligence human rights obligations can operate to unmask Australia's enduring failure to effectively prevent foreseeable harm to 'at risk' individuals and groups. This is shown in relation to two significant groups of refugees which Australia forcibly transferred to Nauru or Papua New Guinea (PNG), namely women and gay men.[7] While the article's discussion of these two 'at risk' groups does not encompass the full range of risks or harms of externalization, it nonetheless provides distinct and compelling examples of Australia's failure to adequately fulfil its positive obligations under international human rights law. Ultimately, the article argues that refugee protection must extend beyond minimalist visions of asylum, as reflected in certain State externalization practice that fixates on the prohibition of *refoulement*, to encompass ongoing positive obligations to respect, protect, and fulfil the human rights of refugees in extraterritorial settings, including the fundamental rights of women and LGBTQI refugees. As a result, the possible gender- and sexuality-based human rights violations arising under Australia's externalization regime have immediate and urgent relevance as other States consider or implement similar policies.

2. EXTRATERRITORIAL ASYLUM REGIMES AND GENDER- AND SEXUALITY-BASED HARMS

The concept of externalization, as expressed in the context of international refugee law and protection regimes, is described by the United Nations High Commissioner for Refugees (UNHCR) as:

> measures taken by States – unilaterally or in cooperation with other States – which are implemented or have effects outside their own territories, and which directly or indirectly prevent asylum seekers and refugees from reaching a particular 'destination' country or region, and/or from being able to claim or enjoy protection there.[8]

UNHCR distinguishes between externalization practices that involve 'inadequate safeguards to guarantee international protection' and lawful practices that involve the 'transfer of the

6 See eg Daria Davitti, 'Beyond the Governance Gap: Accountability in Privatized Migration Control' (2020) 21 German Law Journal 487.

7 While the focus here is on gender- and sexuality-based harms, similar risks may arise from other characteristics, such as age, religion, cultural identity, or pre-existing mental ill health. These are compounded by characteristics shared by all refugees, such as a history or fear of persecution, being outside the country of origin, and often speaking a language not widely spoken in their host countries.

8 United Nations High Commissioner for Refugees, 'UNHCR Note on the "Externalization" of International Protection' (28 May 2021) para 5 <https://www.refworld.org/docid/60b115604.html> accessed 31 July 2023.

Downloaded from https://academic.oup.com/jirl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

responsibility for international protection, undertaken in accordance with international standards'.[9] While lawful practices may include the 'correct application' of 'safe third country' concepts, unlawful externalization arrangements have the potential to 'shift, minimize or avoid responsibilities, obstructing rather than facilitating access to international protection'.[10] As UNHCR has rightly warned, such unlawful practices can lead to the 'indefinite "warehousing" of asylum-seekers in isolated places, exposing them to indirect refoulement and other dangers'.[11] Yet, the 'lack of precision and clarity'[12] concerning what constitutes lawful international cooperation around refugee protection has allowed 'states in the Global North to exploit the concept as a way of attempting to outsource and externalise their obligations under the Refugees Convention to poorer states at their peripheries'.[13] More recently, such concerns have been expressed about the risks of the United Kingdom (UK)–Rwanda arrangement for some refugees.[14] For example, even prior to the UK Supreme Court's finding that the arrangement was unlawful on the basis that it may place transferred refugees at a 'real risk of ill-treatment by reason of refoulement',[15] a parliamentary report by the UK Women and Equalities Committee highlighted the inadequacy of the Home Office's 'case-by-case risk assessments' prior to removing refugees to Rwanda.[16] The report noted the 'significant number of vulnerable people' identified for removal included women survivors of trafficking, and recommended that the UK government clarify 'how it intends to monitor and ensure that those removed to Rwanda do not suffer harm or experience discrimination'.[17]

Extraterritorial asylum regimes involving the forcible transfer of refugees to so-called 'safe third countries' for processing and/or resettlement form part of broader State practices of externalizing asylum obligations.[18] Often, such regimes are implemented through legally unenforceable agreements between cooperating States. For example, the arrangements negotiated between Australia and both Nauru and PNG for the transfer, detention, refugee status determination (RSD), and possible resettlement of refugees from 2012 onwards (described below) were underpinned by several memoranda of understanding (MOUs) that set out the responsibilities

9 ibid paras 5–6.

10 ibid para 3. See also Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration and Refugee Protection in the 21st Century* (Martinus Nijhoff Publishers 2015).

11 UNHCR, 'Note on the "Externalization" of International Protection' (n 8) paras 3, 7.

12 Michelle Foster, 'The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 Melbourne Journal of International Law 395, 396.

13 Sara Dehm, 'International Law at the Border: Refugee Deaths, the Necropolitical State and Sovereign Accountability' in Shane Chalmers and Sundhya Pahuja (eds), *Routledge Handbook of International Law and the Humanities* (Routledge 2021) 341.

14 Médicins Sans Frontières, 'Public Letter from the UK Medical Community on the Dangerous Health Consequences of Rwanda Expulsions' (14 June 2022) <https://msf.org.uk/article/public-letter-uk-medical-community-dangerous-health-consequences-rwanda-expulsions> accessed 31 July 2023.

15 *R (on application of AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42, para 149.

16 Women and Equalities Committee, *Equality and the UK Asylum Process* (Fourth Report of Session 2022–23) (27 June 2023, HC 93) 60 <https://publications.parliament.uk/pa/cm5803/cmselect/cmwomeq/93/report.html#heading-7> accessed 31 July 2023. Despite the UK Supreme Court ruling, the UK prime minister continued to indicate his commitment to this arrangement: Rt Hon Rishi Sunak MP, 'PM Remarks on Supreme Court Judgement' (15 November 2023) <https://www.gov.uk/government/speeches/pm-remarks-on-supreme-court-judgement-15-november-2023> accessed 30 November 2023.

17 Women and Equalities Committee (n 16) 60.

18 See Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (Cambridge University Press 2011); Maarten den Heijer, *Europe and Extraterritorial Asylum* (Bloomsbury 2012); Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (Cambridge University Press 2015); Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press 2018). While in-depth consideration of broader State externalization practices that do not involve transfer to third States, but that nonetheless prevent the arrival of refugees, are beyond the scope of this article, such practices can also have disproportionate and discriminatory impacts on women and LGBTQI people, as noted in *Report of the Special Rapporteur on the Human Rights of Migrants, Francois Crépeau: Regional Study: Management of the External Borders of the European Union and Its Impact on the Human Rights of Migrants*, UN doc A/HRC/23/46 (24 April 2013) 7.

Downloaded from https://academic.oup.com/jirl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

of the parties.[19] Although the MOUs provided for different resettlement processes for refugees in Nauru and PNG, they committed the parties to ensuring that 'transferees' are 'treated with dignity and respect and that relevant human rights standards are met', and that 'vulnerable transferees' would benefit from 'special arrangements'.[20] Nonetheless, the regime has been characterized by rampant human rights violations, including incidences of assault, sexual violence, rape, and medical neglect.[21] It has also fundamentally circumscribed the capacity of refugees to exercise self-determination or freedom of movement.

Despite the trend towards refugee externalization arrangements by global North States, there has been limited scholarly attention to the gender- and sexuality-based risks of harm associated with such practices. Addressing the experiences of refugee women, Saba Vasefi and Sara Dehm have identified specific sites of gendered violence under Australia's extraterritorial asylum regime, including forced family separations, the medicalization of refugee women's bodies, and heightened risk of, and impunity for, sexual violence.[22] Jaz Dawson has addressed the harms experienced by LBGTQI refugees under Australia's regional refugee policies, including a failure to protect queer refugees transferred offshore, and the policy's perpetuation of both homophobia and colonial relations with neighbouring States in the region.[23] Behrouz Boochani has also documented allegations of rape and persecution of a gay refugee on Manus Island by guards, with no recourse to protection or a remedy.[24] Vasefi and Dehm argue that these forms and sites of gendered State violence warrant examination as they are 'not simply incidental to the operation of Australia's refugee externalization practices' but rather are 'a defining feature of the structural violence of Australia's deterrence framework'.[25]

This article uses the term 'Australia's extraterritorial asylum regime' with caution given the neocolonial connotations of locating Nauru and PNG 'offshore' in relation to Australia, rather than centring their own positions or geopolitical context.[26] In fact, both Nauru and PNG have at times asserted their sovereign control over the arrangements, with significant impacts. Notable incidents include the PNG Supreme Court decision in April 2016 which found that detention within the 'closed' Manus Island Regional Processing Centre (RPC) was unconstitutional,[27] and the Nauru government's insistence from at least September 2018 onwards that any medical transfers, including urgent medical evacuations, required its prior approval.[28] Yet, for assessing legal responsibility under international human rights law, centring Australia is appropriate. As discussed below, Australia is the State that (i) initiated the arrangements; (ii) transferred the

19 See, most relevantly, 'Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues' (3 August 2013) (Nauru–Australia MOU); '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' (6 August 2013).

20 See Nauru–Australia MOU (n 19) paras 17, 18.

21 *Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru*, UN doc A/HRC/35/25/Add.3 (24 April 2017) ('*Mission to Australia*') 15; Coroners Court of Queensland, 'Inquest into the Death of Hamid Khazaei', File No 2014/3292 (30 July 2018).

22 Saba Vasefi and Sara Dehm, 'Refugee Women and the Gendered Violence of Australia's Extraterritorial Asylum Regime on Nauru' (2022) 41 Refugee Survey Quarterly 529.

23 Jaz Dawson, 'The Externalization of Australian Refugee Policy and the Costs for Queer Asylum Seekers and Refugees' (2020) 74 Australian Journal of International Affairs 322. See also Paula Gerber and others, 'Human Rights in Papua New Guinea: Is This Where We Should Be Settling Refugees?' (2016) 22 Australian Journal of Human Rights 27.

24 Behrouz Boochani, 'The Gay, Transgender and Bisexual Men on Manus Are Forced into Silence' *The Guardian* (15 May 2018) <https://www.theguardian.com/commentisfree/2018/may/16/the-gay-transgender-and-bisexual-men-on-manus-are-forced-into-silence> accessed 31 July 2023.

25 Vasefi and Dehm (n 22) 529, 531.

26 cf Cait Storr, *International Status in the Shadow of Empire: Nauru and the Histories of International Law* (Cambridge University Press 2020) 252–55.

27 *Namah v Pato* [2016] PGSC 13.

28 *ELF18 v Minister for Home Affairs* [2018] FCA 1368; *EUB18 v Minister for Home Affairs* [2018] FCA 1432, para 36; Helen Davidson, 'Australia Let Nauru Block Refugee Medical Transfers to Preserve "Relationship"' *The Guardian* (30 September 2018) <https://theguardian.com/australia-news/2018/sep/30/australia-nauru-medical-transfers-relationship> accessed 31 July 2023.

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

refugees to Nauru or PNG; (iii) funded, operated, and administered the arrangements; and (iv) has been widely found to have 'effective control', and thus jurisdiction, over the people and places subject to the arrangements in Nauru and PNG at all relevant times during the duration of the arrangements.

The under-examined and structural deterrence role played by gendered violence within extraterritorial asylum regimes highlights the importance of investigating such serious harms, as well as avenues of accountability and prevention. In analysing the role of due diligence obligations, the article considers their capacity to expose the specific gender- and sexuality-based risks and harms generated by Australia's extraterritorial asylum regimes and engage State responsibility for such risks and harms. Accordingly, scrutinizing State failure in the context of refugee externalization arrangements draws attention to how these arrangements themselves produce new risks of gender- and sexuality-based harms.

3. POSITIVE HUMAN RIGHTS OBLIGATIONS UNDER EXTRATERRITORIAL ASYLUM REGIMES

In the context of refugee externalization, sending State obligations encompass both negative and positive obligations under international human rights law.[29] Sending States are under a negative duty not to violate human rights through the arrangements as a whole, or through specific implementing decisions, such as individual transfer decisions. Additionally, sending States are under a positive duty to protect and fulfil specific human rights obligations,[30] including through exercising due diligence in instituting and implementing externalization arrangements. Violeta Moreno-Lax and Martin Lemberg-Pedersen have described this as a 'dual duty to refrain from any conduct that may result in arbitrary violations as well as the obligation to enact laws and policies that effectively protect individuals against abuse'.[31] Indeed, scholars have stressed that due diligence obligations 'cannot be delegated, even where the state outsources functions to other actors'.[32] A failure on the part of the sending State to act diligently to protect 'at risk' individuals and prevent human rights violations may result in State responsibility, even if the harm is caused by a third party, such as the receiving State or a private actor. As a result, the violating State may be liable to make reparations.[33]

While UNHCR's Note on the 'Externalization' of International Protection does not specifically refer to the concept of due diligence, it emphasizes that sending States have the '[p]rimary responsibility' for undertaking a range of measures.[34] These include identifying protection needs, making independent inquiries, and ensuring that arrangements comply with international human rights law obligations, especially in cases where the sending State continues to exercise 'effective control over persons or places on the territory of another State'.[35] The Refugee Law Initiative's Declaration on Externalisation and Asylum, a recent civil society initiative, also stresses the duty of sending States to undertake 'pre-transfer assessments' of refugees

29 On positive human rights obligations, including in extraterritorial settings, see Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (Oxford University Press 2023).

30 Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press 2021) 51.

31 Violeta Moreno-Lax and Martin Lemberg-Pedersen, 'Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization' (2019) 56 Questions of International Law 5, 24.

32 Monnheimer (n 30) 71.

33 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', UN doc A/56/10 (2001) arts 14(3), 31, 36. See eg *González et al ('Cotton Field') v Mexico*, Inter-American Court of Human Rights Series C No 205 (16 November 2009), where compensation was awarded to the families of girls and women who died after local authorities had failed to fulfil due diligence obligations when they went missing in Ciudad Juarez, Mexico.

34 UNHCR, 'Note on the "Externalization" of International Protection' (n 8) paras 9(a), 9(b).

35 ibid para 9(d).

Downloaded from https://academic.oup.com/jirl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

in order to assess whether a transfer is reasonable or lawful.[36] The Declaration stipulates that pre-transfer assessments should consider any 'special needs' of asylum seekers, including 'on the basis of their gender or other protected characteristics, and the capacity of the receiving State to meet those needs'.[37]

This emphasis on State obligations to undertake individualized and context-dependent assessments reinforces that the required standard of diligent conduct depends on, and is shaped by, the particular primary obligation owed to specific refugees on the basis of their status or protected characteristics, as well as the factual circumstances of the specific externalization arrangement.[38] Due diligence is considered to be a positive obligation of conduct, rather than of result, even if this distinction is at times blurred.[39] This means that States may not necessarily violate their human rights obligations even if harm occurs, provided that they have taken adequate and sufficient steps to identify and mitigate foreseeable risks of harm.[40] Positive obligations of diligent conduct mean that States are 'merely obliged to employ the reasonable means at their disposal if they have a knowledge of specific human rights risks'.[41] For this reason, due diligence obligations are necessary but not standalone mechanisms to prevent human rights violations, particularly in the face of deterrence-oriented externalization regimes designed to subvert meaningful access to asylum in global North States. Indeed, there is a risk that due diligence obligations may operate as hollow 'risk management' compliance procedures if implemented by States in bad faith in ways that fail to undertake robust, evidence-based assessments of foreseeable risk.[42]

While there is limited jurisprudence on the scope of due diligence human rights obligations in the context of refugee externalization, importantly, the United Nations (UN) Human Rights Committee has found that such obligations can extend to certain extraterritorial settings.[43] In *AS v Italy*, a migrant boat sank in international waters, killing over 200 people. Italy knew that the boat was in distress but delayed rescue efforts. The Committee found that the migrants had a 'special relationship of dependency' with the Italian authorities, meaning that Italy had failed to fulfil its due diligence obligations pursuant to the migrants' right to life.[44] Endorsing the requirement that States act diligently, the Committee noted States' positive obligation to adopt appropriate measures to protect the right to life 'from all *reasonably foreseeable threats*', stipulating that 'such due diligence requires taking *reasonable*, positive measures that do not impose *disproportionate burdens* on States parties in response to reasonably foreseeable threats to life'.[45]

This decision helpfully illuminates three pivotal elements for understanding States' due diligence human rights obligations in the context of extraterritorial asylum settings: State knowledge, State capacities, and reasonableness. First, States will be required to act diligently if

36 Refugee Law Initiative, 'Declaration on Externalisation and Asylum' (2022) 34 International Journal of Refugee Law 114, 118.

37 ibid.

38 Anne Peters, Heike Krieger, and Leonhard Kreuzer, 'Due Diligence: The Risky Risk Management Tool in International Law' (2020) 9 Cambridge International Law Journal 121, 122. Not all positive human rights obligations will be obligations of due diligence, and there are important distinctions between these concepts. See Vladislava Stoyanova, 'Due Diligence versus Positive Obligations: Critical Reflections on the Council of Europe Convention on Violence against Women' in Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (eds), *International Law and Violence against Women: Europe and the Istanbul Convention* (Routledge 2020).

39 Monnheimer (n 30) 56. Monnheimer conceptualizes due diligence human rights obligations as a 'subset' of positive human rights obligations more broadly.

40 See Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal 459.

41 Monnheimer (n 30) 69.

42 Ferstman (n 40).

43 UN Human Rights Committee, 'General Comment No 31 [80]: 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) para 10; see also UN Committee against Torture, 'General Comment No 2: Implementation of Article 2 by States Parties', UN doc CAT/C/GC/2 (24 January 2008) paras 16, 18.

44 *AS v Italy* (n 4) paras 7.8, 8.5.

45 ibid para 8.3 (emphasis added).

Downloaded from https://academic.oup.com/jirl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

they have actual or inferred knowledge of a particular threat or risk of violation. Given that actual (that is, positive) State knowledge may be difficult to establish, constructive knowledge can be inferred from the objective circumstances surrounding a particular risk of harm, including available reporting, warnings, or information about the likelihood of a risk.[46] States are thus required to identify and address 'reasonably discoverable threats'.[47] Failure to make reasonable inquiries can amount to wilful blindness in breach of due diligence obligations.[48]

Secondly, in assessing whether a 'burden' is 'disproportionate', State capacity may inform the required standard of diligent conduct. While the relevance of State capacity to determining the scope and content of due diligence obligations remains contentious and unsettled, international courts and tribunals have at times accepted that questions of State capacity – such as in relation to territorial control or capacity to influence certain situations – can inform the expected standard of conduct.[49] Yet, capacity considerations appear unlikely to hinder the extension of robust due diligence obligations to extraterritorial settings in the context of refugee externalization where a State may be exercising effective control over persons or places, even if fulfilling due diligence requirements may be more complicated or difficult in practice. For instance, sending States may not have sufficient territorial control to undertake 'fact-finding' investigations, nor access to full information about particular risks. Sending States are also unlikely to have control or authority over laws, institutions, or practices in receiving States, even where they are exercising effective control (and thus jurisdiction) over persons or places within extraterritorial asylum regimes.[50] Yet, State capacity arguments ring hollow in the face of global North refugee externalization practices, where States such as Australia have allocated exorbitant budgets to design, implement, and oversee these policies, and may also assert diplomatic influence through official aid programmes.[51]

Thirdly, and relatedly, the element of reasonableness means that States are obliged to use 'all means reasonably available to them' in order to prevent reasonably foreseeable harms. This entails an assessment of the available legal means at States' disposal in order to fulfil their positive human rights obligations, allowing for a balancing of interests, including the severity of the potential harm, the likelihood of harm materializing, and the importance of the affected rights.[52] Yet, as Maria Monnheimer notes, the 'inherent subjectiveness' and context-specific nature of this standard of reasonableness can make it difficult to objectively determine whether a State has breached its due diligence obligations.[53]

As discussed below, of these three elements, the element of State knowledge (actual or constructive) is paramount in triggering human rights due diligence obligations in asylum externalization contexts.

46 Monnheimer (n 30) 121. See also *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4.
47 Monnheimer (n 30) 118, quoting Kimberley Trapp, *State Responsibility for International Terrorism* (Oxford University Press 2011) 66.
48 Ferstman (n 40) 471.
49 Monnheimer (n 30) 121–23. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 430, where the International Court of Justice noted that 'a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger'.
50 Monnheimer (n 30) 71.
51 Ben Doherty, 'Budget Immigration Costs: Australia Will Spend Almost $3.4m for Each Person in Offshore Detention' *The Guardian* (12 May 2021) <https://www.theguardian.com/australia-news/2021/may/12/australia-will-spend-almost-34m-for-each-person-in-offshore-detention-budget-shows> accessed 25 November 2023. For the updated, annual costs of offshore detention, see Refugee Council of Australia, 'Offshore Processing Statistics' (18 November 2023) <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/7/> accessed 25 November 2023.
52 Monnheimer (n 30) 134.
53 ibid 129.

Downloaded from https://academic.oup.com/jirl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

4. AUSTRALIA'S RESPONSIBILITY FOR ITS EXTRATERRITORIAL ASYLUM REGIME

It is useful to examine how due diligence obligations are engaged in one of the longest running examples of refugee externalization to date: Australia's extraterritorial asylum regime. In its most recent iteration, Australia sent people seeking asylum by boat from August 2012 to Nauru or PNG for assessment of their asylum claims, with a view to permanent resettlement either in PNG or elsewhere (but not Australia). Most of those transferred have now left Nauru and PNG, either returning to their country of origin; being resettled in another State, such as Canada, New Zealand, or the United States; or being allowed to reside temporarily in Australia.[54] The present analysis accordingly relates to Australia's obligations during the period that asylum seekers were being sent to (and living in) Nauru and PNG, between 2012 and mid-2023.[55]

During the first decade of the operation of Australia's extraterritorial asylum regime, the available evidence suggests that Australia did undertake cursory pre-departure assessments of asylum seekers' fitness to be transferred from immigration detention in Australia to immigration detention in either Nauru or PNG. However, as discussed below, these did not constitute genuine individualized assessments, and many children and adults with pre-existing vulnerabilities that would be exacerbated by being transferred were nevertheless sent 'offshore'. There, they were indefinitely detained, first in closed immigration detention and later in Australian-funded accommodation in the Nauruan or PNG community. Conditions were harsh and unsafe, with Médicins Sans Frontières (MSF) describing 'the mental health suffering on Nauru [as] among the worst MSF has ever seen, including in projects providing care for victims of torture'.[56] At its worst, deaths and rapes occurred in the context of Australia's failure to fulfil its due diligence human rights obligations.[57]

The analysis below focuses on the level of knowledge that Australia held prior to transfers, giving rise to due diligence obligations concerning gender- and sexuality-based risks, as well as how such risks materialized into actual, preventable, and at times severe, harm. The article argues that Australia's failure to meet these obligations amounts to clear violations of Australia's key human rights obligations concerning women and LGBTQI refugees. These violations arose at at least two points in time, both prior to forcible transfer (at which point risk of harm was foreseeable) and following, once it became clear that these foreseeable risks were materializing into actual harm.

It has been widely accepted that Australia retains responsibility to protect and fulfil its human rights obligations towards the refugees it transfers to Nauru and PNG, notwithstanding any new obligations accrued by the receiving States. Australia has been found to be in effective control of the people whom it transferred offshore by UNHCR,[58] the UN Human Rights

54 All refugees left Nauru in June 2023, with refugees in PNG due to leave imminently at the time of writing: Ben Doherty and Eden Gillespie, 'Last Refugee on Nauru Evacuated as Australian Government Says Offshore Processing Policy Remains' *The Guardian* (25 June 2023) <https://www.theguardian.com/australia-news/2023/jun/25/last-refugee-on-nauru-evacuated-as-australian-government-says-offshore-processing-policy-remains> accessed 23 November 2023; Ben Doherty, 'Last Refugees in Papua New Guinea to Begin Leaving "Within Weeks" after Australian Funding Runs Out' *The Guardian* (23 October 2023) <https://www.theguardian.com/australia-news/2023/oct/23/papua-new-guinea-refugees-begin-leaving-png-australia> accessed 23 November 2023. While the present analysis is necessarily based on historical events, the ongoing capacity of Australia to transfer refugees to Nauru means that these violations could be ongoing or re-emerge in the future.

55 Doherty and Gillespie (n 54); Doherty (n 54).

56 Médicins Sans Frontières, *Indefinite Despair: The Tragic Mental Health Consequences of Offshore Processing on Nauru* (2018) 4. Regarding the adequacy of pre-transfer assessments, see Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) 190–94.

57 Médicins Sans Frontières (n 56) 11, 20; *Report of the Special Rapporteur on the Human Rights of Migrants* ('*Mission to Australia*') (n 21) 15.

58 UNHCR, 'Submission to the Australian Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (27 April 2015) <https://www.unhcr.org/en-au/publications/legal/5811912b7/submission-to-the-senate-select-committee-on-the-recent-allegations-relating.html> accessed 31 July 2023.

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

Committee,[59] the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee),[60] the UN Committee on the Elimination of Racial Discrimination (CERD),[61] and the Special Rapporteur on the human rights of migrants,[62] among others. Domestically, Australian courts and federal parliamentary committees have also found that Australia is responsible for harm arising in offshore detention. In *Plaintiff S99/2016 v Minister for Immigration and Border Protection*, the Federal Court of Australia held that the Australian Minister for Immigration owed a duty to procure a safe and lawful abortion for a refugee woman residing in the Nauruan community who had been sexually assaulted.[63] This duty of care arose from the particular relationship of dependency between the woman and the Minister, including that the woman was 'entirely reliant' on the Minister to access the procedure she needed.[64]

In examining the scope of Australia's positive human rights obligations, the issue of timing warrants special consideration. There are at least two points in time when Australia's knowledge of risk of harm could be inferred and from which due diligence obligations are likely to have emanated: first, at the time of forcible transfer from Australia, Australia was on notice of specific risks faced by certain groups of refugees; secondly, after people had been transferred, Australia gained access to additional knowledge that confirmed that these groups faced an ongoing, foreseeable risk of harm. Additional obligations could have arisen where Australia took actions that it knew could increase the risks faced by people it had transferred, for example, by refusing a doctor's request for medical transfer or forcing people to live in accommodation that was reasonably suspected of being unsafe.[65] At all points in time, Australia was under an ongoing due diligence obligation to ensure that the rights of people it transferred to Nauru and PNG under international human rights law were respected, including rights to be free from discrimination and cruel, inhuman or degrading treatment.

Indeed, Australian practice implicitly acknowledges its own initial and ongoing oversight and monitoring obligations. Notwithstanding the lack of transparency concerning the operation of Australia's extraterritorial asylum regime, available documentation indicates that Australia conducted initial pre-departure assessments of individual refugees whom it forcibly transferred to Nauru and PNG, and committed to doing so within 48 hours of their initial arrival in Australia. UNHCR has repeatedly expressed serious concerns about the quality of these assessment reports, noting in December 2012 that they appeared formulaic and based on a 'rigid pro-forma template which appears to restrict the scope of questioning and limit the assessment to a record of comments rather than any [substantive] analysis of needs'.[66] Similarly, UNHCR reiterated in July 2013 and November 2013 that such pre-departure assessments did 'not appear to assess the individual needs of children or persons of heightened vulnerability', emphasizing again that such mechanisms must provide for a 'realistic assessment of the actual quality of support

59 UN Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Australia', UN doc CCPR/C/AUS/CO/6 (1 December 2017) para 35.

60 CEDAW Committee, 'Concluding Observations on the 8th Periodic Report of Australia', UN doc CEDAW/C/AUS/CO/8 (25 July 2018) para 17.

61 CERD, 'Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia', UN doc CERD/C/AUS/CO/18-20 (26 December 2017) para 30.

62 *Report of the Special Rapporteur on the Human Rights of Migrants* ('*Mission to Australia*') (n 21) paras 72, 73.

63 *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17.

64 ibid para 262.

65 In *Plaintiff S99* (n 63), multiple medical requests for transfer were disregarded by the Minister for Immigration. A series of cases following *Plaintiff S99* demonstrated that medical requests for transfer were often ignored: see Kaldor Centre for International Refugee Law, 'Medical Transfer Proceedings' <https://www.kaldorcentre.unsw.edu.au/medical-transfer-proceedings> accessed 31 July 2023. Regarding the security of accommodation provided by Australia, see *Plaintiff S99* (n 63) para 80.

66 UNHCR, 'UNHCR Mission to the Republic of Nauru, 3–5 December 2012' (14 December 2012) para 59 <https://www.refworld.org/pdfid/50cb24912.pdf> accessed 31 July 2023.

Downloaded from https://academic.oup.com/jirl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

and capacities' available within the 'currently prevailing' conditions within third States.[67] This includes the 'identification of vulnerabilities such as pre-existing trauma' that could heighten the risk of harm to individual refugees and 'assessment as to whether … transfer should occur at all'.[68] Such independent findings demonstrate the lack of effective due diligence measures to meaningfully consider the specific gender- or sexuality-based risks of transfer, detention, and possible prolonged temporary resettlement in Nauru or PNG, prior to transfer taking place.

Following forcible transfer from Australia, additional procedural mechanisms existed that could have facilitated Australia's compliance with due diligence obligations. Australia continued to be involved in refugees' day-to-day lives, including by providing essentials for daily living such as accommodation, health care, and financial support.[69] People transferred to Nauru and PNG by Australia were also unable to leave those countries without Australia's consent and support, inhibiting their ability to protect themselves from the risks they faced there. Australia retained oversight and control over the practical operation of offshore detention and local resettlement arrangements, including through the establishment of joint committees consisting of official representatives of Australia and Nauru or PNG.[70] Australia funded contractors to carry out individual needs assessments and developed settlement support plans for refugees removed offshore.[71] Despite such contractual arrangements, there is no publicly available evidence that these assessments in fact took place, or of their quality. As set out below, women and LGBTQI refugees continued to experience harm in offshore settings, indicating that these procedures were not adequate to protect people and that, ultimately, Australia did not take seriously the risks created by the externalization arrangements.

4.1 Gender-based risks of harm

Under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[72] States are obliged to actively eliminate sex-based discrimination against women, including through adopting proactive policy measures and legislative protections. Although CEDAW does not specifically mention violence against women, the CEDAW Committee's General Recommendations Nos 19 and 35 make clear that addressing all forms of gender-based violence is part of a State's obligations under CEDAW.[73] The scope of this obligation is both broad and targeted, requiring States to end violence against women at the hands of State actors as well as to prevent and punish gender-based violence by non-State actors. General Recommendation No 35 specifically describes this obligation as one requiring due diligence on the part of States.[74] This obligation is reinforced through additional human rights instruments, with, for example, the UN Committee against Torture emphasizing that States have an obligation to 'prevent and protect victims from gender-based violence' under the Convention against

67 UNHCR, 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 11–13 June 2013' (12 July 2013) 1, 3 <https://www.refworld.org/pdfid/51f61ed54.pdf> accessed 31 July 2023; UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru, 7–9 October 2013' (26 November 2013) 3 <https://www.refworld.org/docid/5294a6534.html> accessed 31 July 2023.

68 UNHCR, 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 23 to 25 October 2013' (26 November 2013) 28, para 135 <https://www.unhcr.org/au/sites/en-au/files/legacy-pdf/58117aff7.pdf> accessed 31 July 2023; UNHCR, 'Monitoring Visit to Nauru, October 2013' (n 67) 3.

69 *Plaintiff S99* (n 63) paras 77, 79.

70 See eg Nauru–Australia MOU (n 19) para 22.

71 This contractual arrangement is outlined in *Plaintiff S99* (n 63) para 57.

72 CEDAW (n 3).

73 CEDAW Committee, 'General Recommendation No 19: Violence against Women' (1992); CEDAW Committee, 'General Recommendation No 35 on Gender-Based Violence against Women, Updating General Recommendation No 19', UN doc CEDAW/C/GC/35 (26 July 2017). See also CEDAW Committee, 'General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women', UN doc CEDAW/C/GC/32 (14 November 2014) para 8. See also Andrew Byrnes and Eleanor Bath, 'Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: Recent Developments' (2008) 8 Human Rights Law Review 517.

74 CEDAW Committee, 'General Recommendation No 35' (n 73) paras 8, 27.

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

Torture (CAT), and that deporting women to face known risks of gender-based violence can amount to torture or cruel, inhuman or degrading treatment.[75] Article 12 of the CEDAW also commits States parties to eliminating discrimination in accessing health care, with additional supports required for pregnant women.

In the context of refugee women, the CEDAW Committee has clarified that obligations extend to women outside a State's territory where those women are under the State's 'effective control or jurisdiction'.[76] Christine Chinkin has argued that CEDAW requires a high standard of due diligence, given that the CEDAW Committee has adopted a 'zero tolerance' approach towards violence against women.[77] Paulina García-Del Moral and Megan Alexandra Dersnah suggest that the CEDAW Committee's jurisprudence to date has advanced a 'feminist understanding of due diligence' in how the Committee has used this concept to challenge and blur the 'public/private' divide, particularly in family violence cases.[78]

Australia's actions, however, demonstrate a failure to fulfil these due diligence obligations and, at times, the infliction of additional gender-based harms. Prior to sending refugee women offshore in 2012, Australia was on notice that women generally in Nauru were at risk of gender-based violence, including sexual violence.[79] The risk of violence against women was exacerbated by the known lack of secure refuges for women escaping violence, as well as concerns regarding the ability of the Nauruan police force and justice system to investigate, prosecute, and secure convictions for crimes involving violence against refugee women.[80] Until August 2015, for example, the Nauruan justice system in practice required any allegations of sexual violence to be corroborated, a requirement that the Nauruan Supreme Court itself acknowledged was discriminatory and unconstitutional.[81] Furthermore, limited institutional safeguards ensuring privacy and confidentiality have led to an unwillingness by some women to report crimes against them, for fear of suffering further harm.[82]

In Nauru, while refugees remained detained in the RPC, accounts of sexual intimidation and assaults against refugees repeatedly emerged from case workers, who reported these concerns to Australian authorities.[83] The then Minister for Immigration, Scott Morrison, commissioned

75 UN Committee against Torture, 'General Comment No 2' (n 43) para 18.

76 CEDAW Committee, 'General Recommendation No 32' (n 73) para 7.

77 Christine Chinkin, 'The CEDAW Committee and Violence against Women' in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law*, vol 2 (Routledge 2015) 369, 375–76.

78 Paulina García-Del Moral and Megan Alexandra Dersnah, 'A Feminist Challenge to the Gendered Politics of the Public/Private Divide: On Due Diligence, Domestic Violence, and Citizenship' (2014) 18 Citizenship Studies 661.

79 World Health Organization, 'Profiles on Mental Health in Development: Republic of Nauru' (2012) 14 <https://extranet.who.int/mindbank/item/2502> accessed 31 July 2023.

80 According to UNICEF, *Nauru: A Situation Analysis of Children, Women & Youth* (August 2005) 41–42, there was a perception that domestic violence was increasing in Nauru but it was undocumented, due to underreporting and a failure to collect disaggregated data. See also the UN Entity for Gender Equality and the Empowerment of Women, *Ending Violence against Women and Girls: Evidence, Data and Knowledge in Pacific Island Countries: Literature Review and Annotated Bibliography* (2nd edn, July 2011) 17; Save the Children Australia, *Nauru Assessment Report: 30th June 2014* (released by the Australian Department of Foreign Affairs and Trade pursuant to a freedom of information request) <https://www.dfat.gov.au/sites/default/files/dfat-foi-lex4872.pdf> accessed 31 July 2023. Regarding the capacity of the Nauruan police force and legal system, see Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Final Report* (31 August 2015) paras 2.34–2.49.

81 *The Republic of Nauru v Saeed Mayahi* [2015] NRSC 15 (5 August 2015) para 23. The practice of requiring corroboration was not a legislative requirement but was acknowledged by the Supreme Court of Nauru in this case: paras 12–15.

82 Ministry of Home Affairs and Department of Women's Affairs, Government of Nauru, *Nauru Family Health and Support Study: An Exploratory Study on Violence against Women* (2014) 17 <https://asiapacific.unfpa.org/sites/default/files/pub-pdf/Nauru_family_health_support_survey_report_2014.pdf> accessed 31 July 2023.

83 Philip Moss, *Review into Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru: Final Report* (February 2015) Executive Summary, paras 7–21; Part 3. See also Paul Farrell, Nick Evershed, and Helen Davidson, 'The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Australian Offshore Detention' *The Guardian* (10 August 2016) <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention> accessed 23 November 2023; Natasha Blucher, 'Submission 83 to the Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (2015) paras 130–40.

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

a report by Philip Moss, which detailed allegations of rape, sexual assault, and sexual exploitation suffered by refugees detained at the RPC.[84] The report also detailed fears and threats of future assaults which might be suffered after refugees were released from immigration detention into the Nauruan community. It was considered likely that both physical and sexual assaults (including of minors) were underreported. Reasons for underreporting included refugees anticipating negative repercussions if they reported crimes against them, not wanting to be known to have suffered a crime of this nature for family and/or cultural reasons, and privacy concerns flagged above.[85] The lack of local capacity to investigate these crimes was identified as an area for improvement,[86] but it is not clear what lasting action was taken by Australia in response.[87] Allegations of sexual assault persisted in Nauru following the report's publication,[88] with statements and actions of Australian officials exacerbating trauma and demonstrating a lack of good faith in seeking to identify and mitigate risk.[89]

The lack of access to adequate forms of health care was also a key issue that raised a foreseeable risk that article 12 of the CEDAW would be breached, as well as potentially constituting cruel, inhuman or degrading treatment under article 7 of the ICCPR[90] and article 16 of the CAT.[91] Australia was aware that pregnancy termination was illegal in both Nauru and PNG at the time that women were being sent to Nauru.[92] Australia was (or ought to have been) aware that culturally appropriate and trauma-informed health care, including access to in-person translation for people requiring care and high-level mental health care, was not generally available.[93] This left some women requiring complex gender-specific health care without the ability to adequately understand proposed treatment, or, indeed, to provide informed consent.

This knowledge should have put Australia on notice that sending women offshore could expose them to an unacceptable level of risk, both in terms of gender-based violence and subsequent compounding of trauma. States are generally not considered to be responsible for all acts of sexual and gender-based violence that arise within their jurisdictions. This responsibility would only arise under due diligence obligations where a State is on notice of a particular risk, has the means to take action to minimize or eliminate that risk, and chooses not to do so. Additional, direct responsibility could arise where Australia's actions have exacerbated harms, as described above.

84 Moss (n 83) Executive Summary, paras 7–21; Part 3.

85 ibid 4–5, 46, 77; see also Ministry of Home Affairs and Department of Women's Affairs, Nauru (n 82) regarding underreporting of sexual assaults generally in Nauru.

86 Moss (n 83) paras 17–19.

87 While the Minister at the time accepted all recommendations of the Moss Review, anecdotal reports make clear that women continued to feel unsafe in Nauru, including being provided with accommodation that could not be locked and insufficient lighting in refugee settlements. Several high-profile reports of sexual assault in the community followed the Moss Review, including that detailed in *Plaintiff S99* (n 63), discussed above.

88 Letter from Special Procedures Mandate Holders to Australia (16 November 2015) <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=22211> accessed 31 July 2023.

89 See eg Helen Davidson, 'Peter Dutton Condemned for "Vile and Offensive" Nauru Rape Claims' *The Guardian* (21 June 2019) <https://www.theguardian.com/australia-news/2019/jun/21/peter-dutton-condemned-for-vile-and-offensive-nauru-claims> accessed 2 August 2023. For the types of actions Australia took that exacerbated the risk of harm, see *Plaintiff S99* (n 63) paras 287, 338, 380–87, 405.

90 ICCPR (n 3).

91 CAT (n 3).

92 Criminal Code 1899 (Nauru) ss 224 and 225, as in force between 2011 and 2016. This was replaced by the Crimes Act 2016 (Nauru) ss 66–69. In practice, pregnancy termination was unlawful and women requiring terminations, including for pregnancies resulting from rape, had to leave Nauru to access them: see *Plaintiff S99* (n 63). In PNG, pregnancy termination is unlawful according to the Criminal Code Act 1974 (PNG) ss 225–26. Despite this law, Australia sought to send women from Nauru to PNG for pregnancy terminations, as detailed in *Plaintiff S99* (n 63).

93 *Plaintiff S99* (n 63) paras 341, 343, 364–67 describes the level of care necessary for refugee women in Nauru requiring pregnancy terminations.

Downloaded from https://academic.oup.com/jirl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

4.2 Sexuality-based risks of harm

Unlike CEDAW's gender-specific human rights protection, the lack of specific treaty instruments addressing discrimination on the basis of sexuality means that State obligations to prevent sexuality-based harms are founded in general international human rights law.[94] The foundational right to equality and non-discrimination under core human rights instruments obliges States to guarantee and protect individual rights 'without distinction of any kind', such as on the basis of sex or 'other status'.[95] While sexuality is not explicitly listed in any treaty, sexual orientation and gender identity have repeatedly been recognized as prohibited grounds of discrimination.[96] Discrimination against LGBTQI individuals takes various forms, including social vilification, threats of and actual violence, and outright criminalization.[97] For example, UN human rights treaty bodies have recognized that, where this discrimination manifests in threats, abuse, or assaults, it can amount to cruel, inhuman or degrading treatment in contravention of article 7 of the ICCPR[98] and article 16 of the CAT.[99] While States will not be legally responsible for all harms that are perpetrated against LGBTQI people, such treaty obligations place positive obligations on States to eradicate sexuality-based violence or discrimination in their laws and practices, and to adopt adequate safeguards to prevent discrimination and cruel, inhuman or degrading treatment of LGBTQI people. This requires sending States to pay much closer attention to how refugee externalization regimes pose specific risks to LGBTQI refugees (and those perceived to be LGBTQI).

As with violence against women, Australia was on notice of the foreseeable risk of harm to men it sent offshore who identify as gay or who have sex with men. In Nauru, sex between men[100] was criminalized until 2016. Similarly, PNG continues to criminalize sex between men, despite decriminalization law reform efforts.[101] While prosecutions in PNG have been limited in recent years, such laws nonetheless mean that the possibility of gay refugees being intimidated, prosecuted, or even imprisoned on the basis of their sexuality remains a material and foreseeable risk. Such laws can also facilitate a culture of impunity around hate crimes towards gay refugees.

Given that these laws are public, Australia ought to have been fully aware of the risk they posed to gay refugees transferred to Nauru or PNG. At a minimum, this knowledge ought to have put Australia on notice of a need for further investigations regarding the actual risks to gay men in Nauru and PNG, from both State and non-State actors. Despite these clear dangers, Australia does not appear to have conducted any specific risk assessment for those who were transferred offshore who might have faced additional risks in this regard, and again may have engaged in direct violations.

As with refugee women, there is now substantial evidence to suggest LGBTQI refugees were at risk in Nauru and PNG, and that those risks materialized over time, giving rise

94 Violence based on sex, sexual orientation, gender identity, and gender expression are at times inseparable. See Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 Human Rights Law Review 293.

95 ICCPR (n 3) art 2(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 2(2), 2(3).

96 See eg Committee on Economic, Social and Cultural Rights, 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)', UN doc E/C.12/GC/20 (2 July 2009) para 32.

97 International Commission of Jurists, 'International Human Rights Law and the Criminalization of Same-Sex Sexual Conduct' (Briefing Paper, May 2010) 4.

98 UN Human Rights Committee, 'General Comment No 31' (n 43) para 8.

99 UN Committee against Torture, 'General Comment No 2' (n 43) para 18.

100 Criminal Code 1899 (Nauru) s 211, as in force between 2011 and 2016. This provision does not appear to have been replicated in the Crimes Act 2016 (Nauru), which replaced the Criminal Code.

101 Criminal Code Act 1974 (PNG) s 212. See also Christine Stewart, *Name, Shame and Blame: Criminalising Consensual Sex in Papua New Guinea* (ANU Press 2014).

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

to additional obligations for Australian authorities. Allegations of sexual assaults in the single adult male section of the Manus Island and Nauru detention facilities were made soon after they reopened[102] and have persisted throughout the period that people have been held offshore.[103] Senate and government inquiries repeatedly flagged the risks to LGBTQI people who were transferred offshore,[104] as did UNHCR, media, and civil society reports. For example, in October 2013, UNHCR stated that resettling LGBTQI refugees in PNG 'raises serious protection concerns'.[105] Amnesty International reported that detainees had been 'threatened with mandatory reporting to the [PNG] police force for any criminal activity' including consensual same-sex activity, following their November 2013 visit.[106] When asked about such allegations, then Australian Immigration Minister Scott Morrison reportedly denied that it was official policy to refer refugees to the PNG police for instances of same-sex consensual activity. Instead, he dismissed concerns about the treatment of LGBTQI refugees under Australia's extraterritorial asylum regime on the basis that he was 'unaware of any claims or declarations of homosexuality' from refugees in PNG.[107] Such an official position could amount to a failure to exercise an ongoing due diligence obligation to make reasonable inquiries in the face of mounting evidence of both the presence of LGBTQI refugees in PNG, but also the foreseeable risks to them, particularly given that such disclosure would be less likely given the legal circumstances, and wilful ignorance on the part of the sending State cannot amount to a lawful excuse.[108]

Rather than ensuring that due diligence obligations regarding non-discrimination towards LGBTQI refugees were fulfilled, a presentation was created by an Australian-funded contractor, the Salvation Army, as part of a formal 'education campaign about life in PNG' and shown to all refugees transferred to PNG in late 2014 (and likely before and after this time too). This presentation contained a warning that 'homosexuality is illegal in PNG'[109] and included two images, one of two men kissing and the other of two women kissing, both with red crosses superimposed on the images. This education campaign was reportedly developed in consultation with PNG and Australian officials, with the justification that it provided 'clear advice' to refugees about PNG laws.[110] Subsequent media reporting on the situation facing gay refugees in PNG documented their experiences of assault and ongoing fears of persecution.[111]

Similar accounts emanating from Nauru confirm how the architecture of externalization itself creates specific sexuality-based harms. In March 2016, it was reported that homosexual refugees

102 Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Books 2016) 62; Robert Cornall, *Report to the Secretary Department of Immigration and Border Protection: Review into Allegations of Sexual and Other Serious Assaults at the Manus Regional Processing Centre* (September 2013) <https://www.homeaffairs.gov.au/reports-and-pubs/files/review-manus-offshore-processing-centre-publication-sep2013.pdf> accessed 31 July 2023.

103 Senate Standing Committee on Legal and Constitutional Affairs, *Report: 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* (2017) para 1.33.

104 ibid; Cornall (n 102); Senate Standing Committee on Legal and Constitutional Affairs, *Report: Incident at the Manus Island Detention Centre from 16 February to 18 February* (2014) paras 469, 477.

105 UNHCR, 'Monitoring Visit to PNG, October 2013' (n 68) para 123.

106 Amnesty International, *This Is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (2014) 51 <https://www.amnesty.org/en/documents/asa12/002/2013/en/> accessed 28 March 2024. See also Human Rights Watch, *World Report 2017: Papua New Guinea* (2017) <https://www.hrw.org/world-report/2017/country-chapters/papua-new-guinea> accessed 31 July 2023.

107 Oliver Laughland, 'Scott Morrison Denies Amnesty Report on Manus Island Detention' *The Guardian* (13 December 2013) <https://www.theguardian.com/world/2013/dec/13/scott-morrison-denies-amnesty-report-findings-on-manus-island-detention> accessed 31 July 2023; see also Oliver Laughland, 'Gay Asylum Seekers Told They Could Be Reported to PNG Police, Amnesty Says' *The Guardian* (11 December 2013) <https://www.theguardian.com/world/2013/dec/11/gay-asylum-seekers-told-they-could-be-reported-to-png-police-amnesty-says> accessed 31 July 2023.

108 Ferstman (n 40) 471.

109 Laughland, 11 December 2013 (n 107).

110 ibid.

111 Oliver Laughland, 'Gay Asylum Seekers on Manus Island Write of Fear of Persecution in PNG' *The Guardian* (24 September 2014) <https://www.theguardian.com/world/2014/sep/24/gay-asylum-seekers-manus-island-fear-persecution-png> accessed 31 July 2023.

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

who had been transferred to Nauru by Australia were 'holed up in fear for their lives after being bashed and verbally abused'.[112] Further, in a self-published account of his experiences, one refugee narrated how his requests to be housed in the same accommodation as his male partner – first within the Nauruan RPC, and later within Australian-funded accommodation – were repeatedly refused on the basis that homosexuality was then illegal in Nauru.[113] He also described being asked by a case officer to sign a document agreeing not to reveal his same-sex relationship to the Nauruan government, police, or public when he was moved into the Nauruan community, something he refused to do.[114] Such experiences evidence how, rather than the risk of harm to LGBTQI refugees emanating solely from the social and legal conditions within receiving States, externalization arrangements themselves can create new forms of harm and instances of sexuality-based discrimination by placing people in situations of increased vulnerability.

5. CONCLUSION

There is an urgent need to attend to 'abuse and exploitation entrenched within externalization strategies'.[115] As deterrence-oriented extraterritorial refugee processing and resettlement regimes expand, such abuse must be analysed not simply in terms of risk of *refoulement* but also via attention to conditions in receiving States. This article's analysis of sending States' positive human rights obligations to protect refugees from unlawful gender- or sexuality-based discrimination and from cruel, inhuman or degrading treatment recognizes that the lawfulness of 'safe third country' practices is dependent upon transferred refugees enjoying fundamental human rights in receiving States.[116] It also emphasizes the *ongoing* nature of sending States' obligations to protect refugees, including women and LGBTQI refugees, from human rights abuses in both the establishment *and* operation of extraterritorial asylum regimes. Raising these issues before domestic and regional courts, and in human rights accountability fora such as UN human rights treaty bodies, could allow refugees to better ensure that sending States' human rights obligations travel with them when extraterritorial asylum regimes are deployed. Moreover, given the requirement that States must use reasonably available means to address foreseeable risks, due diligence human rights obligations have the capacity to stretch far beyond the point of establishment of extraterritorial regimes, and into the extended, complex, and shifting settings to which refugees are forcibly removed and where they experience harms at the hands of a diverse range of actors. As Anne Peters, Heike Krieger, and Leonhard Kreuzer have argued, due diligence human rights obligations fill 'an accountability gap in situations where a State cannot be held responsible either as a perpetrator of a wrongful act or as an accomplice to it'.[117]

Australian practices demonstrate that, while States may engage in minimalist forms and mechanisms of due diligence compliance in instituting extraterritorial asylum regimes, these may be insufficient to meet the standard required of States to protect and fulfil their positive human rights obligations. Where implemented in bad faith, due diligence risks functioning as a means to 'rubber stamp' extraterritorial arrangements that in fact seek to evade responsibility and accountability. As Carla Ferstman has demonstrated, due diligence policies implemented

112 Nicole Hasham, 'Gay Refugees on Nauru "Prisoners" in Their Home as Australia Prepares to Celebrate Mardi Gras' *Sydney Morning Herald* (4 March 2016) <https://www.smh.com.au/politics/federal/gay-refugees-on-nauru-prisoners-in-their-home-as-australia-prepares-to-celebrate-mardi-gras-20160304-gnam2h.html> accessed 31 July 2023.

113 Nima, 'In Detention: Gay on Nauru' (*Archer Magazine*, 17 July 2018) <https://archermagazine.com.au/2018/07/detention-gay-nauru> accessed 31 July 2023.

114 ibid.

115 Moreno-Lax and Lemberg-Pedersen (n 31) 32.

116 UNHCR, 'Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers' (May 2013) <https://www.refworld.org/docid/51af82794.html> accessed 31 July 2023.

117 Peters, Krieger, and Kreuzer (n 38) 130.

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

in the context of European Union migration control arrangements with Libya 'have tended to lack robustness and transparency' and the 'proceduralization' of due diligence has in practice granted too much room for State discretion or the further outsourcing of 'risk management'.[118] While these limits are reflected in the Australian example, this article has shown how a robust understanding of due diligence human rights obligations requires initial and ongoing evidence-based assessments of the actual foreseeable risks of harm to individuals based on their unique circumstances, mitigation of that harm where possible, and implementation of alternatives where mitigation is not possible. In this way, good faith due diligence obligations have the potential to function as a preventative, remedial, and visibility tool of accountability to address the unique, foreseeable, and ongoing forms of gender- and sexuality-based harm posed to refugees by externalization.

Downloaded from https://academic.oup.com/ijrl/article/36/1-2/60/7659094 by Lola Matheus user on 28 August 2024

118 Ferstman (n 40) 460, 464.