UN Special Rapporteur on the Human Rights of Migrants

Externalization of Migration and the Impact on the Human Rights of Migrants

Submission by

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Submission author information

I provide this submission in my capacity as a legal academic with expertise in human rights law, public law, and international refugee law. I am an Associate Professor in the Deakin Law School in Melbourne, Australia and have written extensively on Australia's offshore processing system.[1] For further information on my work, my professional profile can be viewed at https://experts.deakin.edu.au/63718-maria-o'sullivan/publications.

I give my consent for this submission to be made publicly available.

[1] See eg M O'Sullivan, 'Identifying Asylum-Seekers as Potential Refugees: Transfers and 'Acquired Rights' under the Refugee Convention' in S. Kneebone et al (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, 2014); A Dastyari and M O'Sullivan, '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*' (2016) 42(2) *Monash University Law Review;* M O'Sullivan, '*Namah v Pato:* Challenging Detention using Constitutional Human Rights law Protections in Offshore Destination States' in Kirsten McConnachie and Sarah Singer (eds) *Landmark Cases in International Refugee Protection* (Hart, forthcoming 2025).

Overview

Australia's offshore asylum regime permits Australian authorities to transfer 'unauthorised' asylum seekers to 'regional processing centres' in the Pacific for processing and detention. An offshore processing centre currently operates in Nauru and operated in Papua New Guinea from 2012- 2021.[2]

I note that the Call for Inputs refers to the October 2024 UN HRC decisions relating to externalisation in Nauru: *M.I. et al. v Australia* and *Nabhari v Australia*. These decisions set out a comprehensive analysis of the offshore processing system in Nauru. Therefore, I will focus my submission on the other aspect of Australia's offshore processing regime – the use of Manus Island in Papua New Guinea.

The legal framework for the transfer of asylum-seekers from Australia to Papua New Guinea is comprised of legislative authorisation under the Australian Migration Act and a number of bilaterial agreements between the two countries. In 2012, Papua New Guinea was designated as a 'regional processing country' pursuant to the Australian Migration Act[3] and a set of bilateral agreements were signed to underpin the transfer of asylum-seekers to Papua New Guinea in 2012[4] and 2013.[5]

Significantly, the 2013 Regional Resettlement Arrangement states that '[t]he regional processing centre will be managed and administered by Papua New Guinea under Papua New Guinea law, with support from Australia'.[6] Legal challenges to this externalisation regime lodged under Australian law have therefore been extremely difficult to successfully undertake because, although the designation of PNG as a 'regional processing country' is made under *Australian* law, the management and operation of the offshore centres is stated in the bilateral agreements to be a matter of *Papua New Guinea* law.

One aspect of the offshore processing regime which operated in Papua New Guinea was that asylum seekers transferred by Australia were held in detention on the Manus Island Processing

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[2] 'Regional processing' or 'offshore processing' within the Australian context is the system by which legislatively designated 'unauthorized maritime arrivals' (persons who attempt to arrive to Australia by boat), are transferred by Australian authorities to an offshore Regional Processing Centre for processing, detention and resettlement. Note that Australia terminated its regional processing contract with PNG in 2021 and is no longer utilised as an offshore processing/detention centre: see Minister for Home Affairs, 'Joint media release with the Hon. Westly Nukundj MP - Finalisation of the Regional Resettlement Arrangement', 06 October 2021, minister.homeaffairs.gov.au/KarenAndrews/Pages/finalisation-of-the-regional-resettlement-arrangement.aspx.

[3] Minister for Immigration and Citizenship (Cth), *Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under Subsection 198AB(1) of the Migration Act 1958*, F2012L02003, 9 October 2012.

[4] *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*, (Intergovernmental Agreement, 29 August 2012); Independent State of Papua New Guinea and Commonwealth of Australia, *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 of Persons in Papua New Guinea, and Related Issues* (Intergovernmental Agreement, 8 September 2012).

[5] Independent State of Papua New Guinea and Commonwealth of Australia, *Regional Resettlement Arrangement between Australia and Papua New Guinea* (Intergovernmental Agreement, 19 July 2013 ('2013 RRA'); Independent State of Papua New Guinea and Commonwealth of Australia, *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* (Intergovernmental Agreement, 6 August 2013) ('2013 MOU').

[6] 2013 RRA (n 5) Clause 4.

Centre ('Manus Island). The operation of this 'processing centre' as a closed centre raised human rights concerns, including the right to liberty.

As Australia's offshore processing and detention system has been widely analysed in UN and academic reports, I am going to focus on the issues raised in **Question 7** in the Call for Inputs **– Responsibility and Jurisdiction** as this has not been addressed in as much detail in existing commentary.

In focusing on this particular issue, I wish to emphasise that there are many problems associated with externalisation, particularly Australia's offshore processing system, which I am not able to fully analyse in this brief submission. For instance, it is notable that the costs of offshore processing are extraordinarily high. In 2019 the Asylum Seeker Resource Centre, Save the Children and GetUp! published a report titled "At What Cost?", outlining the human and financial cost of Australia's offshore system. The report found that offshore detention and processing cost around $AUD 9 billion over the period 2016 to 2020.[7] Further, there have been significant problems with access to adequate healthcare for refugees in PNG and Nauru (both in terms of physical and mental health).

Question 7 (a) How can the responsibility of the externalising State be established in cases of human rights violations?

There are two points which I think are significant to make in relation to making the externalising state responsible for human rights violations arising from the operation of externalisation in Papua New Guinea and the successful legal challenges made to that system.

1. The use of tort law/negligence actions

Whilst not a direct human rights challenge, the Australian experience suggests that **tort law -** specifically arguments relating to **negligence** – can be successful in establishing legal responsibility of an externalising State for human rights violations.

This is demonstrated by a successful **class action** - a tort claim for compensation for negligence and false imprisonment - approved by the Victorian Supreme Court in Australia in 2017.[8] This class action was lodged by 1,923 asylum seekers[9] who had been detained at the Manus Island detention centre between 2012 and 2016. The plaintiffs claimed that they had been falsely imprisoned, that the Australian government and its contractors had a duty of care to asylum-seekers and that this duty had been breached through deaths, systemic sexual and physical

[7] Asylum Seeker Resource Centre (Australia) 'At What Cost?', 2013, www.asrc.org.au/wp-content/uploads/2013/04/1912-At-What-Cost-report.pdf.

[8] *Kamasaee v Commonwealth of Australia & Ors*, S CI 2014 6770 Kamasaee v Commonwealth of Australia & Ors (Approval of settlement)[2017] VSC 537. The class action was instigated in 2014 and the plaintiff sought leave to amend his statement of claim in April 2016 to include a claim for damages for false imprisonment following the decision in *Namah* – see discussion in *Kamasaee v Commonwealth of Australia & Ors (No 10) (Issues for trial ruling)* [2017] VSC 272 para 7 where the decision in *Namah* is specifically referred to. Note that another class action was instigated shortly following the decision in *Namah* but was discontinued and relodged: *Plaintiffs S99-2014 v Minister for Immigration and Border Protection (Cth) & Ors* [2016] HCATrans 125 (31 May 2016).

[9] Of these, 1,690 asylum-seekers were part of the eventual settlement to registered members of the class action: see Supreme Court of Victoria, 'Manus Island Detention Centre class action' (website), www.supremecourt.vic.gov.au/news/manus-island-detention-centre-class-action-0#_ftn1.

abuse, and inadequate medical treatment/neglect.[10] In 2017, the Australian court made orders for a $70 million settlement of this action.

See also the use of negligence arguments in **individual cases**, such as:

- In *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs and Another* [2005] FCA 549 where the Federal Court held that the Commonwealth Government owed a duty of care to detainees in immigration detention.[11]

- *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483 where the Federal Court the Minister has a duty of care to the applicant. This case involved a female asylum-seeker who applied to the court to be transferred to Australia to obtain an abortion. The Court found that the Australian Minister for Immigration had a duty of care in that case:
    - to exercise reasonable care to discharge the responsibility he assumed to procure for her a safe and lawful abortion; ·
    - that the abortion in Papua New Guinea made available to the applicant is attended by safety and lawfulness risks that a reasonable person in the Minister's position would have avoided, and thus that the procuring of the abortion by the Minister did not discharge his duty of care;
    - there is reasonable apprehension that the Minister will fail to discharge his duty of care.[12]

2. Challenges made in the destination state

Much of the commentary on externalisation discusses the arguments which may be raised about responsibility via litigation in the *externalising* state. This is demonstrated by the fact that numerous legal challenges were instigated within Australia in an attempt to overturn the Australian legislative and constitutional underpinning of the offshore detention regime. However, whilst the tortious class action discussed above was successful, none of these cases were successful in dismantling the legal underpinnings of the offshore system.[13]

I would like to emphasise the value of challenging the responsibility of the externalising state in the *processing/destination* state. An example of this is the decision of the Papua New Guinea Supreme Court in *Namah v Pato* which is discussed in further detail under Question 7(c).

[10] *Kamasaee v Commonwealth of Australia & Ors*, S CI 2014 6770.
[11] Available at https://jade.io/article/110561
[12] Avaialable at https://jade.io/article/464120
[13] See eg *Plaintiff S156-2013 v. Minister for Immigration and Border Protection* (2014) 254 CLR 28, challenging the legality of offshore detention in Papua New Guinea. See also *Plaintiff M68/2015 v. Minister for Immigration and Border Protection* (2016) 257 CLR 42, challenging the legality of offshore detention on Nauru. A number of class actions based in tort were successful, but these have not been directed at the lawfulness of the legal foundation of the system.

Question 7 (b) What jurisdictional approaches may be invoked to assess the extraterritorial application of human rights obligations in the context of externalisation practices involving migrants?

In my opinion, one jurisdictional approach which can be invoked is to emphasise the *joint responsibility* of externalising state and destination state in the operation of externalisation regimes. This is demonstrated by the approach taken in the Papua New Guinea Supreme Court case of *Namah v Pato* [2016] PGSC 13 (discussed in detail below).

In this case, the Papua New Guinea court mentioned the responsibility of Australia in the detention of transferees. For instance, Justice Kandakasi stated that '[i]t was the *joint efforts* of the Australian and PNG governments that has seen the asylum seekers brought into PNG and kept at the MIPC against their will.'[14] His Honour also held that '[t]he First Respondent and the Second Respondent with the assistance of the Australian government are responsible for all of the decisions and actions that have led to the transfer and detention of asylum seekers or transferees.[15]

Question 7 (c) Please provide examples of rulings by international or national courts related to externalisation measures, including addressing migrants who have not yet reached the territory of destination countries.

An interesting example of a ruling by a national court relating to externalisation measures is the decision of the Papua New Guinea Supreme Court in *Namah v Pato* [2016] PGSC 13.

The PNG Supreme Court in *Namah v Pato*, in a unanimous decision of five judges, held that detention of refugees and asylum seekers in the Australian-funded centres in that country was unconstitutional under the right to liberty set out in the *Papua New Guinea Constitution*.[16] The Court ordered, inter alia, that both the Australian and Papua New Guinea governments 'take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees … on Manus Island'.[17]

The Supreme Court found the detention of asylum seekers and recognised refugees in the processing centres was unconstitutional for a number of reasons. First, it interpreted the migration exception to the right to liberty in section 42(1)(g) of the Papua New Guinea Constitution as only available against persons who have entered or remain in the country without a valid entry permit.[18] The court found that 'the asylum seekers had no intention of entering and remaining in PNG' (rather, their intended destination was Australia).[19] It held that they did not enter PNG and did not remain their of their own accord but were forcibly transferred and detained on Manus Island by the PNG and Australian governments.[20]

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[14] *Namah v Pato* [2016] PGSC 13 15-16 [39] [emphasis added].
[15] ibid 27 [73].
[16] *ibid* (per Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ). Their Honours were in general agreement as to the conclusions and reasoning in the decision, with Kandakasi and Higgins JJ writing individual reasons.
[17] ibid 28 [74].
[18] ibid 15 [38]. In doing so, the Court read s42(1)(g) of the Constitution in light of the detention provisions in section 13 of the PNG Migration Act.
[19] ibid 15 [39].
[20] ibid 15–6 [38]–[39].

The court found that:

> [t]reating those required to remain in the relocation centre as prisoners irrespective of their circumstances or their status save only as asylum seekers, is to offend against their rights and freedoms as guaranteed by the various conventions on human rights at international law and under the *PNG Constitution*.[21]

It is important to note that the Supreme Court did not simply focus on the *fact* of detention in rendering the detention unconstitutional, it also considered the *condition*s of detention to be relevant. This is reflected in the findings of Justice Kandakasi who considered the *manner* in which the asylum seekers were treated at the Manus Island Centre:

> The detention *and the way in which the asylum seekers are treated at the Manus Island Relocation or Processing Centre* in so far as they affect their other constitutional rights and freedoms such as the right to freedom under s 32 of the Constitution are unconstitutional and are also ultra vires the powers available under the Migration Act.[22]

The judgment of Justice Higgins also noted that an additional consideration was whether 'the *conditions* of detention are such as to damage the rights and dignity of the detainees or, worse, causes physical or mental suffering'.[23] This is important as the Papua New Guinea Manus centre had been criticised by a number of international organisations and civil society groups for overcrowding and poor conditions and lack of safety for the detainees.[24]

The Court also found the 2014 amendment to the *PNG Constitution* passed to forestall the litigation in the matter was invalid. It held that the PNG Government had failed to demonstrate that the amendment was 'reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind' having regard to s 38 of the *PNG Constitution*.[25] In concluding that the 2014 amendment was invalid, the Court specifically stated that '[t]he human rights and dignity of the detainees or the asylum seekers which are guaranteed by the relevant provisions of the *Constitution* need to be respected'.[26] This is significant finding as it categorises asylum seekers as holders of human rights under the *PNG Constitution*.

Conclusions

The jurisdictional construction of externalisation measures usually involves the externalising State transferring asylum seekers to a destination State with an agreement that such transfer also moves the responsibility for transferees to the destination State. This has been and continues to be the argument of the Australian Government in relation to its offshore processing system in Nauru and Papua New Guinea.

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[21] Ibid 24-25 [66]–[69], citing UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention* (2012) and the 1951 *Refugee Convention*.
[22] ibid 27 [74] (emphasis added).
[23] ibid 34 [118] (emphasis added).
[24] See eg Amnesty International, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (December 2013); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014).
[25] *Namah v Pato* (n 14) 21 [54].
[26] ibid 21 [56].

However, the decision of the Supreme Court of Papua New Guinea in *Namah* demonstrates that, contrary to Australia's argument that the centre was 'PNG's responsibility', the legal situation involves ***joint legal responsibility.***

Contact information:

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