Righting the wrongs: attempting accountability at Australia's Regional Processing Centres

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ABSTRACT

This thesis analyses the Australian Government's responsibility for asylum seekers held in immigration detention at Manus Island, Papua New Guinea and Nauru Regional Processing Centres. The first section highlights the enforcement gap in international law with regards to Australia's extraterritorial immigration control. It concludes that international law is currently limited in its protection of asylum seekers held in offshore detention. The argument advanced in the second section challenges the sovereignty/irregular migration dichotomy regularly advanced by states. Historical examples of challenges to Australia's sovereignty reveal the fiction that irregular migration and state sovereignty are irreconcilable. Drawing on the work of Giorgio Agamben, this section contends that the sovereign power to exclude non-citizens from the territory in fact brings the refugee within the legal order through the process of 'inclusive exclusion'. The second section applies Evan Fox-Decent's fiduciary theory in order to reconceptualise the relationship between the state and the immigration detainee. By characterising the state's legal obligations as arising from the exercise of power over immigration detainees, the threat-to-sovereignty argument is undermined. Having established the theoretical bases for the Australian Government's legal obligations, the third section of this thesis proposes tort law negligence as a means to remedy the harm suffered by immigration detainees. Establishing a non-delegable duty of care to detainees may ensure the Australian Government is held accountable for systemic harm suffered at the Regional Processing Centres.

Cette thèse offre une analyse de la responsabilité du gouvernement australien vis-à-vis des demandeurs d'asile détenus dans les centres de traitement régionaux de l'ile de Manus, de Papouasie Nouvelle Guinée et de Nauru. La première section souligne la non-application du droit international au regard du contrôle extraterritorial exercé par l'Australie sur l'immigration. Elle conclut que le droit international n'offre actuellement qu'une protection limitée aux demandeurs d'asiles détenus dans les centres offshore. La deuxième section remet en question la dichotomie souveraineté/migration illégale communément avancée par les Etats. L'Histoire montre que l'impossible conciliation entre ces deux notions relève de la fiction. En s'appuyant sur le travail de Giorgio Agamben, cette section argumente que le pouvoir souverain d'exclure du territoire les non-citoyens ramène en fait les réfugiés dans l'ordre juridique, par le procédé d' « exclusion inclusive ». La deuxième section applique la théorie fiduciaire d'Evan Fox-Decent afin de reconceptualiser la relation entre l'Etat et les migrants détenus. En définissant les

obligations juridiques de l'Etat comme provenant de l'exercice de son pouvoir sur les détenus, l'argument selon lequel la souveraineté serait menacée par l'immigration est affaibli. Après avoir établi les bases théoriques des obligations juridiques du gouvernement australien, la troisième section de cette thèse propose de recourir a la responsabilité délictuelle comme moyen de réparation du préjudice subi par les détenus. Etablir une obligation de diligence intransmissible envers les détenus permettrait de s'assurer que le gouvernement australien est tenu pour responsable du préjudice systémique subi dans les centres de traitement régionaux.

TABLE OF CONTENTS

ACKNOWLEDGMENTS 5
GLOSSARY 6
INTRODUCTION 9
CHAPTER 1 - Effective control avoided ineffectively: Australia's responsibility under international law 16
Introduction 16
Contextualising the 'eminently foreseeable' consequences at Australia's Regional Processing Centres 18
Manus Island Regional Processing Centre 18
Nauru Regional Processing Centre 20
Lack of transparency instrumentalised 21
Australia's effective control over Manus Island and Nauru Regional Processing Centres . 24
Limitations in *lex specialis*: protection gaps in international refugee law 28
CHAPTER 2 - (De)constructing sovereignty: state power and the apparent dichotomy of irregular migration 33
Introduction 33
Sovereignty's real threat: contradictions in Australia's assertion of sovereign power 35
Securitisation of rights protection 35
Dichotomies and contradictions: Australia and territorial sovereignty 37
Historical anxieties: Australia's hold on sovereignty 42
Inclusively excluded: refugees outside the protection of the law? 44
Limitations of the 'refugee as homo sacer' 46
Reconceptualising the relationship between the state and the refugee 50
The fiduciary theory in Australia and the recurring issue of enforcement 52
CHAPTER 3 - Human rights or civil wrongs? Rethinking enforceable rights protection in Australia 55
Introduction 55
Human rights protection in Australia: a look to the common law 57
Establishing the Commonwealth's non-delegable duty of care to immigration detainees .. 59
The value of the 'special responsibility' to the state-detainee relationship 60
Non-delegable duties and the courts 63
Making the choice of mandatory detention: the Commonwealth's assumption of duty 66
Establishing the central element of control: Australia's role at RPCs 69
The unreasonable failure to take reasonable care 71
Limitations in common law protections of immigration detainees 73
CONCLUSION 75
BIBLIOGRAPHY 78

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GLOSSARY[1]

Term	Definition
Asylum seeker	"A person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status"[2] or other forms of protection.
Border protection/border control	The mechanisms taken by a state to police and 'protect' its territorial borders from the arrival of irregular migrants.
Effective refugee protection	Adequate, humane protection afforded to refugees consistent with international human rights law and consistent with states' obligations under *the Convention Relating to the Status of Refugees*.
Extraterritorial migration control	Policies and practices of controlling (usuall irregular migration, instituted by a state outside its territorial borders. This includes but is not limited to, interdiction of asylum seeker vessels in international waters and th transfer and detention of irregular migrants immigration detention centres outside the recipient state's territory.
(Immigration) detainee	Asylum seeker held in immigration detention.
Immigration detention centres	Australia's onshore as well as offshore immigration detention centres.
Irregular migrant	"A person who, owing to unauthorized entr breach of a condition of entry, or the expiry his or her visa, lacks legal status in a transit host country".[3] This thesis will predominan refer to 'irregular migrants' as they are the subject of Australia's regional processing regime whereas 'asylum seeker' does not necessarily mean the individual arrived by 'irregular' means.

[1] I have deliberately chosen these terms in order to denote a particular meaning, depending on different sections of
[2] International Organization for Migration, "Key Migration Terms", online: International Organization for Migration <https://www.iom.int/key-migration-terms>.
[3] *Ibid*.

Irregular migration	"Movement that takes place outside the regulatory norms of the sending, transit and receiving countries".[4]
Offshore detention centres	Immigration detention centres which are located beyond the territory of the state whi has placed the migrant there (not specific tc Australia).
Onshore detention centres	Australia's immigration detention centres located within Australian territory.
Offshore detention regime	Part of the regional processing regime, specifically the system of offshore detentio Regional Processing Centres.
Regional Processing Centres	Australia's immigration detention centres, located at Los Negros Island, Manus Island Province in Papua New Guinea and the Republic of Nauru.
Regional processing regime	Denotes the system of agreements between Australian Government and its regional processing partners in response to irregular migration pursuant to Australian policies.
State-detainee relationship	The legal relationship between the state and detainee held in immigration detention.
State-refugee relationship	The legal relationship as between the state and the refugee, as described by Anna Lise Purkey with regards to Evan Fox-Decent's fiduciary theory.
Syrian 'refugee crisis'	The current humanitarian crisis forcing mass migration from Syria since 2011.
'The Other'	Denotes the contrast between citizens and non-citizens, in particular with respect to the state's exclusion of 'the Other' from its territory by exercise of sovereign power.

[4] *Ibid*.

Unauthorised maritime arrival	Under the *Migration Act 1958 (Cth)*, an irregular migrant who arrives to Australian territory by sea without authorisation.[5]

[5] *Migration Act 1958 (Cth)*, s 5AA [*Migration Act*].

INTRODUCTION

Despite globalisation having facilitated greater mobility through ease of travel, freedom of movement is met by increasing hostility from prosperous states restricting irregular migration. Extraterritorial migration control is invoked as a popular state policy response to irregular migration, which is characterised as an affront to state sovereignty. The machinations of modern border protection policies mean asylum seekers are often intercepted before they reach the territory of the state they intend to seek asylum from.[6] Multiple state and non-state actors occupy the functions and roles traditionally carried out by recipient states. The result is a fragmentation of the responsibility for the welfare, security and ultimately the protection of asylum seekers' rights.

Mandatory detention of asylum seekers arriving by boat has been central to Australia's immigration policies since it was introduced in 1992. However, the turning point in immigration policy history was the infamous 'Tampa Affair', a boat arrival of over 400 Afghani refugees in Australian territorial waters.[7] The incident was the catalyst for the Pacific Solution, which included the offshore detention and processing of asylum seekers on the Pacific Island nations of Papua New Guinea (PNG) and the Republic of Nauru. The Pacific Solution dramatically securitised Australia's response to irregular migration.[8] The policies increased powers of Australian authorities, including the Australian Defence Force, to board and deter vessels. The Pacific Solution enabled excision of territory from the Australian 'migration zone', and attempted to limit judicial and administrative review.[9] There have been varying permutations of the policy since its introduction in 2001. The heart of the Pacific Solution, though, is that, through its regional partners Nauru and PNG, the Australian Government (the Government) has institutionalised extraterritorial migration control and offshore detention as a policy bulwark

[6] Mark Gibney & Sigrun Skogly, *Universal human rights and extraterritorial obligations* (Philadelphia: University of Pennsylvania Press, 2010) at 55.
[7] The Tampa Affair is a notorious event in recent Australian political history. A Norwegian freighter, the MV Tampa, rescued asylum seekers from their vessel which was in distress on its journey from Indonesia to Australia. The Australian Government, however, refused entry to the Tampa to Australian waters and subsequently their disembarkation in order to prevent any claims for asylum on Australian territory. The event forged a hastened policy response from the Government, a deal known as the Pacific Solution, which led to the asylum seekers' transferal to third countries.
[8] Anne McNevin, "The Liberal Paradox and the Politics of Asylum in Australia" (2007) 42 Australian Aust. J. Polit. Sci. 611 at 620.
[9] Excision of Australian territory from the 'migration zone' had the effect of excluding asylum seekers whom arrived in an 'excised zone' from instituting legal proceedings regarding their detention and transfer: *Migration Act, supra* note 5 at s 494AA; Susan Kneebone, "The Pacific Plan: Provision of 'Effective Protection'?" (2006) 18 Int J Refugee Law, 696 at 697; Mary Crock, Ben Saul & Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Annandale: the Federation Press, 2006) at 117.

against irregular migration. Australia's Regional Processing Centres (RPCs) are situated on Los Negros Island, Manus Island Province in PNG and Nauru (Manus Island RPC and Nauru RPC).[10]

Australia's *Migration Act* differentiates asylum seekers by their mode of arrival. Unauthorised maritime arrivals are defined as individuals arriving to Australia by boat without authorisation.[11] Australian policy dictates that unauthorised maritime arrivals shall be transferred, as soon as practicably possible, to designated third countries for refugee status determination (RSD).[12] Under regional processing agreements, Australia has designated PNG and Nauru as regional processing partners in order to detain, undertake RSD and resettle those individuals found to be refugees in countries other than Australia.[13] Under the *Migration Act*, no unauthorised maritime arrival's claim will be processed in Australia, nor will they be resettled there. The policy is upheld irrespective of whether such asylum seekers are found to be genuine refugees.

Against the background of two decades of regressive migration policies described above, the current Government has instituted Operation Sovereign Borders, which successfully shrouds in secrecy any 'operational matters' on boat arrivals of irregular migrants. Touted as a solution to combat networks of people smugglers, in effect the policy permits the Government to turn back boats to third countries and transfer asylum seekers offshore, with little public scrutiny of these actions.[14] Under Operation Sovereign Borders, recent legislative amendments gave authority to the Minister for Immigration and Border Protection (the Minister) for the removal and transfer of particular irregular migrants to any country of the Minister's choice, irrespective of Australia's non-refoulement obligations under the *Convention Relating the Status of Refugees* (*Refugee Convention*).[15] Article 33 of the *Refugee Convention* prohibits member states from returning refugees to countries where their life or freedom would be threatened on the basis of their "race, religion, nationality, membership of a particular social group or political opinion".[16] The

[10] Herein referred to as Manus Island RPC and Nauru RPC respectively.
[11] *Migration Act, supra* note 5 at s 5AA.
[12] *Ibid* at s 198AD.
[13] *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia*, 3 August 2013 [Nauru MOU]; *Regional resettlement Arrangement between Australia and Papua New Guinea*, 19 July 2013 [PNG MOU].
[14] Oliver Laughland, "Scott Morrison defends vow of silence on asylum seeker boat arrivals" *the Guardian Australia* (23 September 2013), online: Guardian News and Media Limited <http://www.theguardian.com/world/2013/sep/23/scott-morrison-border-policy>.
[15] *Migration Act, supra* note 5 at s 1987C.
[16] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 Article 33 [*Refugee Convention*].

amendments ostensibly permit the Australian Government to subvert the obligation of non-refoulement under Article 33.[17]

Since their inception, the RPCs have been subject to extensive criticism, including that the physical and policy environments are host to multiple human rights abuses and that there has been no clarification of responsibility for the harm caused to asylum seekers in immigration detention. The conditions of the RPCs greatly restrict the enjoyment of basic human rights including: prolonged (sometimes indefinite) detention, lack of access to water and sanitary food, and lack of security and protection from internal and external threats to detainees' safety. This has led to conclusions that the physical environments at the RPCs are grossly inadequate.[18] Of equal concern to human rights commentators is the high number of innocuously titled 'incidents' reported in recent times, which reveal systemic failures in the regional processing regime and the inability of authorities to protect detainees from widespread harm. Alarming reports of these incidents have exposed a high degree of detainee mistreatment including allegations of sexual and physical abuse (as well as sexual abuse of children), violent attacks from locals, officials withholding medical care as well as sexual favours traded in exchange for contraband at the RPCs.[19]

The Australian migration policies and regulations that oversee RPCs are still in place today without amendment: as international and domestic legal challenges have so far failed to enforce any substantial policy change or determine government accountability for the prevention of assaults, sexual assaults and medical negligence. I contend that the cumulative effects of these conditions in immigration detention do, in fact, engage Australia's responsibilities to detainees, pursuant to a host of international legal obligations. Australia's legal responsibility with regards to offshore detention of irregular migrants is empirically unique, given Australia's lack of a constitutional or statutory human rights protection framework. There is a fundamental lack of

[17] Andrew and Renata Kaldor Centre for International Refugee Law, "Legislative Brief: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014" (5 December 2014) online: UNSW law <http://www.kaldorcentre.unsw.edu.au/publication/legislative-brief-migration-and-maritime-powers-legislation-amendment-resolving-asylum#nonrefoulement>

[18] Amnesty International, "This Is Breaking People: Human Rights Violations At Australia's Asylum Seeker Processing Centre On Manus Island, Papua New Guinea" (11 December 2013) online: Amnesty International <https://www.amnesty.org/en/documents/ASA12/002/2013/en/>; United Nations High Commissioner for Refugees, "UNHCR Monitoring visit to Manus Island, Papua New Guinea - 23 to 25 October 2013" at 9-12; Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) at 40 [Manus Inquiry].

[19] *Ibid* at 44-54; Philip Moss, *Review into recent allegations relating to conditions and circumstances at the regional processing centre in Nauru: final report* (Department of Immigration and Border Protection), 2015 [Moss Review].

human rights protection in Australia. Australian courts are limited in their interpretation of international law in the domestic context to the extent that such principles are expressly incorporated by Parliament into legislation.[20] In addition, the domestic human rights framework is undeveloped, as there is neither a federal human rights act nor a constitutional Bill of Rights.[21] Finally, there is no regional human rights institution or framework to which Australia is a party. This trifecta of protection gaps necessarily influences human rights discourse in Australia and the operation of domestic law and its (in)ability to protect fundamental rights of citizens and non-citizens must be understood in this context. This limited human rights environment must frame a study of Australia's accountability with regards to extraterritorial conduct, which substantially affects non-citizens in RPCs.

Debate about the paucity of legal protections of human rights in Australia has increased over recent years, in light of the harsh conditions asylum seekers are subjected to in immigration detention. The deleterious effects of Australia's regional processing regime necessitate a critical analysis as to what extent the Australian Government is responsible for the wellbeing, safety and protection of basic rights of asylum seekers detained at RPCs. This thesis will analyse the Government's liability for harm suffered by asylum seekers in immigration detention. The focus of enquiry will be legal mechanisms that may be utilised in order to determine government liability.

Chapter 1 will discuss the limitations of international law and the protection it affords asylum seekers in precarious situations of offshore detention. It will be argued that, notwithstanding the weight of international law in support of a finding of Australia's effective control over the RPCs, this has had little practical effect in modifying Australia's immigration detention policies. Similarly, protection under the *Refugee Convention* is limited due to the territorial connection underscoring the instrument. Chapter 1 will determine that there exist significant enforcement gaps in the international law framework which are utilised by the Australian Government to maximise border security and minimise the arrival of irregular migrants. Compounding the absence of enforcement mechanisms at international law is the nature of the Australian legal system and its relationship with human rights norms.

[20] *Kioa v West* (1985) 159 CLR 550.
[21] The Australian Constitution has been recognised as expressly protecting a limited categories of rights, namely: "the right to vote, protection against acquisition of property on unjust terms, the right to a trial by jury, freedom of religion and the prohibition of discrimination on the basis of State of residency" The Australian Human Rights Commission, "How are human rights protected in Australian law?" (2006) online: Australian Human Rights Commission, <https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>.

It is important to note from the outset the limitations of this enquiry. Firstly, this thesis is not intended to be a comprehensive analysis of all the different international law mechanisms which might be employed to hold Australia to account. Despite the criticism of the enforcement gap in international law in Chapter 1, the focus of enquiry is not the failures of the international system, but rather the state: in terms of its relationship with the law and its sovereign power. Therefore, I do not offer alternative suggestions for improving the international system, nor do I discuss the benefit of a global or regional human rights court. My emphasis is on current legal mechanisms and the ability of an asylum seeker to engage with the existing domestic legal landscape to achieve accountability for unlawful conduct and provide remedies for harm suffered.

The sovereign power to expel and determine who enters a country's territory is habitually invoked by states in order to justify strict border control measures and immigration detention.[22] The prevalence of irregular migration – and the increasingly militarised response by prosperous states such as Australia – raises the question of whether the principle of state sovereignty can be reconciled with the modern reality of global migration. Deconstruction of the sovereignty/irregular migration dichotomy therefore becomes an essential step in order to challenge pre-existing assumptions of state power and ultimately achieve effective refugee protection.

Chapter 2 will critically analyse the concept of sovereignty with regards to irregular migration to Australia. As sovereignty is raised by the state as justification for determining who enters its borders, it must then follow that the principle of sovereignty is incompatible with states' protection obligations under international refugee law. I will challenge this premise in several ways. Firstly, an examination of the political and legal landscape will reveal historical anxieties over territorial sovereignty, which will in turn partly illuminate Australia's policy responses towards irregular migration. I will contend that the inconsistency in the application and devotion to the principle exposes Australia's contradictory pursuit of territorial sovereignty, and therefore undermines the justification for securitised border control measures.

Chapter 2 will propose a theory of state power with respect to the sovereign power to exclude 'the Other'. Giorgio Agamben's theory of the refugee as *homo sacer* will be advanced in order to

[22] Kneebone, *supra* note 9, at 704.

understand the exclusionary practices of the state in casting out the refugee from protection of sovereign law.[23] It will be argued that the proposition that refugees are outside the law, existing in a legal void, cannot be true where it is Australia's legal system that has forced their exclusion from the state as an exercise of sovereign power. The fact that the state holds the asylum seeker out of reach of access to the juridical order in fact places the asylum seeker within the legal order through express exclusion. It is this 'inclusion through exclusion' which goes to the very heart of the argument of Australia's sovereignty and control at the RPCs.[24]

Finally, Chapter 2 will conclude by reconceptualising the nature of the legal relationship between the state and the refugee. Evan Fox-Decent's theory of the state as fiduciary will be advanced to support the proposition that, not only can the principle of sovereignty and humane migration control co-exist, but the state's legitimacy and authority to govern is predicated on the harmony of the two doing so. By challenging the primacy of sovereignty and its ostensible conflict with humane and effective refugee protection, states' justification for militarised migration control may be overcome.

Human rights discourse has condemned the regional processing regime and its corollaries from the outset. However the stark reality is that the framework of regional processing has become increasingly restrictive despite persistent denouncements of Australia's defiance of international law obligations from human rights commentators. The theoretical reconceptualisation of sovereign power and its relationship with migration control offers an important intellectual contribution to this debate. However, the theories preferred in this analysis fall short of enforcing substantial policy change or achieving accountability for the harm suffered by asylum seekers in immigration detention. This shortfall should be made up by appeals to domestic, regional or international rights frameworks, however for the reasons advanced in Chapter 1, this recourse is not available in the Australian context.

Having challenged the state's theoretical justification for abrogating international legal obligations, Chapter 3 returns to the argument of determining responsibility for the ongoing human rights crises at the Manus Island and Nauru RPCs. Rights protection of asylum seekers through unorthodox means is essential in a legal landscape which is inherently limited

[23] Giorgio Agamben, *Homo sacer: Sovereign power and bare life* (Stanford: Stanford University Press, 1998).
[24] Prem Kumar Rajaram & Carl Grundy-Warr, "The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand" (2004) 42 Int Migr 33 at 34.

concerning human rights protection. Highlighting Australia's exploitation of the protection gaps in international human rights law, this section suggests that reversion to common law negligence claims is a possible legal avenue that may achieve accountability in this context. The resort to non-traditional avenues to remedy the harmful effects of mandatory, offshore detention is illustrative of a frustration with existing legal protection mechanisms, and Australia's interpretation of its international legal obligations.

Chapter 3 will argue that applying tort law to the regional processing regime reconceptualises the notion of the state-refugee relationship in a manner that is less hostile to the principles of state sovereignty, due to the strength in enforcement of the doctrine.[25] In this Chapter, we will see that the weight of domestic jurisprudence could support a finding that the state owes a non-delegable duty of care to detainees at RPCs. Although there are decisions which suggest the existence of this special responsibility of the state to immigration detainees, the question remains open to the High Court of Australia as it is yet to decide on the matter. The significance of pursuing tort law remedies for harm suffered by detainees is indicated by the foreclosure of all other legal remedies available. Accordingly, a cause of action in negligence represents one of the last options for legal protection for asylum seekers in Australian immigration detention.

Taking for granted that the duty is established for present purposes, Chapter 3 concludes that the Australian Government is likely to have breached this duty on the basis that the Government failed to ensure reasonable care was taken of detainees at the RPCs. Accordingly, the Government, as architect of offshore detention, should be found liable in negligence for the systemic mistreatment and poor conditions borne by detainees at the RPCs.

[25] Anna Lise Purkey, "Questioning Governance in Protracted Refugee Situations: The Fiduciary Nature of the State-Refugee Relationship" (2014) 25 Int J Refug Law 693 at 706.

CHAPTER 1 - Effective control avoided ineffectively: Australia's responsibility under international law

Introduction

Extraterritorial migration control is not prohibited under international law, nor is the Australian example an anomaly. In fact, there is a growing trend towards states conducting migration control functions beyond their sovereign borders.[26] Despite this trend, the determination for legal responsibility, and correlated incidents which arise as a result of extraterritorial conduct, remains complex under international law. The difficulty lies in establishing who, among numerous actors, is responsible for conduct that may amount to human rights violations. Further, issues of jurisdiction complicate the determination of the appropriate legal regime that applies to the regulation of particular conduct.

The Australian Government consistently asserts that any incident at the RPCs is the exclusive responsibility of the territorial state in which it occurred.[27] The Government's claim is usually made contemporaneously with a rhetorical acknowledgement of its obligations under international human rights law, notably the *Refugee Convention*.[28] However, rather than giving effect to this rhetorical claim, Australia ostensibly bypasses its protection obligations under the *Refugee Convention*. The Government further denies responsibility for the maintenance, running and thus any associated human rights violations that might occur at the RPCs. Ambiguity as to which state is ultimately held accountable for human rights violations under international law has created a protection gap that is vulnerable to exploitation.

[26] Thomas Gammeltoft-Hansen, *Access to asylum: international refugee law and the globalisation of migration control* (New York: Cambridge University Press, 2011) at 103. For example, United States Customs and Border Protection agency maintains a presence in Canadian Airports. Similarly, the United Kingdom Customs agency is present at Gare du Nord train station in Paris.

[27] Department of Immigration and Border Protection, *Submission 31* at 4 - Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015) at 11-12.

[28] For example, in the recent legislative amendments to the *Migration Act*, the Statement of Compatibility with Human Rights which accompanies the Act states that the provisions do not violate Australia's international legal obligations because "anyone who is found through visa or ministerial intervention processes to engage Australia's non-refoulement obligations will not be removed in breach of these obligations": *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth), Attachment A. However, as described by the Andrew and Renata Kaldor Centre for International Refugee Law, the Government's assertion is incorrect as "A mere discretion to consider non-refoulement obligations is insufficient to comply with duties under international law": Andrew and Renata Kaldor Centre for International Refugee Law, *supra* note 17.

The notion that a state can be absolved of legal obligations the moment it operates beyond its borders is contrary to general principles of international law.[29] The law has developed on an *ad hoc* basis in order to establish mechanisms to regulate the conduct of states acting extraterritorially.[30] Responsibility will be established if a causal link can be made between the state and the conduct in question through the doctrine of effective control.[31]

Australia's current extraterritorial migration control framework is a result of successive government policies to restrict irregular migration. It remains the only country in the world to institute mandatory detention of irregular migrants arriving by boat as a first resort. The regional processing of asylum seekers has formed the central component of two decades of hard-line detention and immigration policies by the Australian Government that substantially disadvantage unauthorised maritime arrivals and asylum seekers generally. Long condemned by international organisations, non-governmental organisations (NGOs) and scholars for the 'prison like' conditions, the RPCs continue to be the focus of systemic and serious mistreatment of asylum seekers; mistreatment which likely constitutes a catalogue of human rights violations.[32]

The nature of the RPCs makes it difficult for asylum seekers to realise their human rights.[33] Not only are the RPCs extremely remote, and situated in jurisdictions where services and healthcare are below the standard of those that would be accepted in Australia, legal representation and media access are also severely limited.[34] This intentional restriction of checks and balances on the regional processing regime not only limits the detainees' fundamental rights, but also has

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[29] Theordor Meron, "The Extraterritoriality of Human Rights Treaties" (1995) 89 Am. J. Int. Law 78-82; International Law Commission, *Articles on State Responsibility*, GA Res 56/83, 2001, 53rd Sess, UN Doc A/56/49 (2001).
[30] *Al-Skeini and others v The United Kingdom [GC]*, [2011] No. 55721/07 ECHR; *Bankovic v Belgium [GC]*, [2001] No. 52207/99 ECHR [*Bankovic*]; *Ilascu and others v Moldova and Russia [GC]*, [2004] No. 48787/99 ECHR; UN Human Rights Committee, "General Comment No. 31 [80], The Nature of the General Legal Obligations Imposed on States Parties to the Covenant" (2004) CCPR/C/21/Rev1/Add13.
[31] Erika Feller, Volker Turk & Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (New York: Cambridge University Press, 2003) at 110.
[32] Andrew and Renata Kaldor Centre for International Refugee Law, "Offshore processing: conditions" (7 April 2015) online: UNSW law <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-conditions>.
[33] Daniel Wilsher, *Immigration detention: law, history, politics* (New York: Cambridge University Press, 2012) at 302.
[34] UNHCR, *supra* note 18 at 11-12; Austl., Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015) at 174. In 2014, the Government of Nauru raised the non-refundable visa application fee for foreign journalists from $200 to $8,000, coinciding with an increase in secrecy surrounding the RPC, it served to limit access to media: Paul Farnell & Ben Doherty, "Nauru lets local journalists into centre but keeps $8,000 fee for foreigners" *the Guardian Australia* (8 October 2015) online: the Guardian News and Media Limited <http://www.theguardian.com/australia-news/2015/oct/08/nauru-lets-local-journalists-into-centre-but-keeps-8000-fee-for-foreigners>.

fostered a culture of impunity towards the treatment of detainees. This secrecy is facilitated by government policies which limit public knowledge of 'on water matters' and censor the reporting of incidents at the RPCs by service providers.[35]

Contextualising the 'eminently foreseeable' consequences at Australia's Regional Processing Centres

Human rights violations at the RPCs are well documented despite the restricted access granted to media and monitoring bodies.[36] Reports from multiple sources including United Nations (UN) bodies and successive parliamentary committees have labelled the RPCs and their corresponding conditions as unnecessarily "harsh and unsatisfactory".[37] A combination of factors – including inadequate conditions, prolonged detention without charge (including detention of children) and resentment of detainees from within local communities – invariably results in an environment which lends itself to human rights violations.[38]

Manus Island Regional Processing Centre

Multiple reports have drawn a link between the inherent deficiencies in the services and infrastructure provided and the unrest at the Manus Island RPC between detainees, locals and guards in 2014, which led to the death of one detainee and the severe wounding of another.[39]

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[35] James Bennett, "Australian Border Force Commissioner says operational matters won't be discussed publicly" *ABC News Online* (1 July 2015) online: Australian Broadcasting Corporation <http://www.abc.net.au/news/2015-07-01/border-force-commissioner-operational-matters-roman-quaedvlieg/6586274>.

[36] In a recent report, the Committee Against Torture concluded that: "the Government of Australia, by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment": Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: observations on communications transmitted to Governments and replies received* UNHRC, 28th Sess, UN Doc A/HRC/28/68/Add.1 7-8.

[37] UNHCR, *supra* note 18 at 1; United Nations High Commissioner for Refugees, "UNHCR Mission to the Republic of Nauru 3-5 December 2012 report" at 1; Austl., *supra* note 18 at 40.

[38] The treatment of asylum seekers and the conditions of detention at the RPCs most likely breach, *inter alia*, the following principles of international human rights law, to which Australia is obliged to uphold: Australia's non-refoulement obligations under the *International Covenant for Civil and Political Rights* [ICCPR] (Article 6), *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (Article 1), *Convention on the Rights of the Child* (CRC) (Articles 6 and 37); the prohibition on arbitrary detention under the ICCPR (Article 9) and the CRC (Article 37(b)); Australia's obligations to ensure those deprived of their liberty to be treated with respect for the dignity of the person under the ICCPR (Article 10(1)): See generally: Australian Human Rights Commission, "Human rights issues raised by third country processing regime" (2013) online: the Australian Human rights Commission <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-issues-raised-third-country-processing-regime>.

[39] Austl., *supra* note 18 at 37.

Reza Barati, an Iranian asylum seeker, was killed in riots at the RPC on 18 February 2014 when he suffered fatal injuries from a rock which was dropped on his head. As well as multiple other injuries to detainees, another asylum seeker lost an eye as a result of injuries acquired during the riots.

The circumstances which precipitated the riot at Manus Island RPC were the subject of an parliamentary inquiry in Australia. Submissions to the *Inquiry into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (the Manus Inquiry) demonstrated that, in the lead up to the incident at the Manus Island RPC, there was severe overcrowding, which meant detainees were sleeping in cramped quarters with little privacy or reprieve from the tropical heat.[40] There was a continuous lack of drinking water and food hygiene was scarce. In addition, health and medical services could not keep up with demand and extended waiting times for even basic medication was common. Notably, security infrastructure at the Manus Island RPC was insufficient given the known tensions both within the compound among detainees and from outside the RPC from locals.[41] The Inquiry heard from G4S, the sub-contractor charged with operating the RPC, about the standard of infrastructure leading up to the riots. At all material times, the Department of Immigration and Border Protection (the Department) retained the authority to implement improvements to infrastructure and service delivery. Despite requests to improve security at the RPC from G4S, in particular the fencing around the compound, the Department failed to implement the recommendations. According to G4S, adequate fencing would have reduced the gravity of the riots in February 2014.[42]

The Inquiry concluded the violent incidents of February 2014 were 'eminently foreseeable' as the many contributing factors were a result of fundamental inadequacies produced by policies governing the physical environment at the RPC.[43] The concentration of human rights violations from this incident alone cannot be seen in isolation, as many of the fundamental failures with the RPC continue to persist. According to immigration detention statistics current from September 2015, 934 adults are currently detained at Manus Island RPC.[44] Detainees continue to be housed

[40] Austl., *supra* note 18 at 40-41.
[41] *Ibid* at 48.
[42] *Ibid* at 49.
[43] *Ibid* at 145.
[44] Elibritt Karlsen, "Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to the statistics" *Commonwealth of Australia* (12 October 2015) online: Parliament of Australia <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/Offshore#_Total_number_of>.

in similar conditions at the RPC as those reported to the Inquiry and factors contributing to sustained human rights abuses and threats to the welfare of detainees at the RPC have failed to be addressed. The Government has knowledge of this information; however, continues to transfer asylum seekers to the Manus Island RPC.

Nauru Regional Processing Centre

Of equal concern are the widespread human rights issues at the Nauru RPC. Allegations of violence towards detainees from within and outside of the RPC, including sexual abuse of detainees, are widely reported. Two major inquiries have recently been conducted into the nature of the conditions and particular instances at the Nauru RPC. Testimony given in the *Review into the Recent Allegations Relating to the Conditions and Circumstances at the Regional Processing Centre in Nauru* (the Moss Review) provoked an extensive Senate inquiry, which confirmed the levels of sexual abuse and culture of mistreatment revealed by the Moss Review.[45] Allegations of rape, threats of rape, sexual abuse and sexual assault of detainees by service providers, as well as other detainees within the facility, were detailed.[46] The Senate inquiry uncovered further allegations of sexual abuse with submissions highlighting the "unsafe conditions, [and] fear for personal safety" at the RPCs as a result.[47]

Inertia of the Australian Government in terms of responses to human rights abuses, despite evidence that the Department was aware of the allegations at early stages of reporting, is striking.[48] Many detainees claimed they failed to report incidents of sexual assault for fear of negative impacts on their refugee claims.[49] Others alleged that a failure to report incidents was due to belief that nothing would be done by local authorities.[50] What is clear from the evidence is that these allegations represent serious indictments on the system of regional processing and

[45] Austl., *supra* note 34 at 98.
[46] *Ibid* at 23-41.
[47] *Ibid* at 98. See also: Austl., Commonwealth, the Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* by President Gillian Triggs (November 2014) at 188.
[48] The multiple reports and inquiries detailing testimony of abuse at the RPCs suggest the Government was, and continues to be, aware of these issues. In one particular instance, former workers at the Nauru RPC alleged that the Department was aware for 17 months of allegations of sexual abuse against children at the centre, without taking any action: Jason Om, "Immigration Department aware of sexual abuse allegations against children for 17 months but failed to act, say former Nauru workers" *ABC News Online* (7 April 2015) online: Australian Broadcasting Corporation <http://www.abc.net.au/news/2015-04-07/nauru-letter-of-concern-demands-royal-commission/6374680>.
[49] Austl., *supra* note 18 at 167.
[50] Moss, *supra* note 19 at 4-5.

indicate the precarious position of asylum seekers and resettled refugees on Nauru. The numerous independent reports verifying the conditions at both RPCs are illustrative not of isolated events randomly threatening the wellbeing and human rights of immigration detainees, but rather a systemic pattern of their abuse and mistreatment.

Lack of transparency instrumentalised

Regional processing and offshore detention of asylum seekers has been met by a simultaneous restriction on access to RPCs granted to the media, NGOs and lawyers.[51] The Australian Government holds that it is the responsibility of Nauru and PNG to grant access to the RPCs. This is indicative of the institutionalised shifting of responsibility within the regional processing regime.[52] Limiting access to the RPCs from these fundamental checks and balances indicates systemic issues with transparency within the immigration detention regime. The Government has successfully created a regime in which unregulated coercive conduct can thrive due to a culture of secrecy. Graphic examples of this culture, and its success, include the non-disclosure of any 'on-water matters' under Operation Sovereign Borders, highly restricted access to the RPCs by the media and more recently criminal sanctions for disclosure of information obtained during the course of employment at, or in connection with, the RPCs.[53]

The introduction of the *Border Force Act* has magnified the culture of impunity within the immigration detention regime by essentially criminalising whistleblowing. The legislation makes it a criminal offence for 'entrusted persons' to disclose 'protected information'.[54] The broad application of these non-disclosure laws covers anyone who provides services to Australian Customs or the Department in any function, and applies extraterritorially. Breaching the non-disclosure provisions of the Act can carry up to two years imprisonment. The legislation is comprehensive and far-reaching, placing no geographical or time limits on the restriction of

[51] Austl., Commonwealth, Australian Human Rights Commission, *Asylum seekers, refugees and human rights: snapshot report 2013* by President Gillian Triggs (2013) at 23.
[52] The Department of Immigration and Border Protection has asserted in the past that "access to [regional processing] centres is a matter for host countries": Department of Immigration and Citizenship, *Response to the Australian Human Rights Commission's (AHRC) 13 August 2013 request for information concerning detention and asylum seekers*, provided by email to the Commission on 16 September 2013, at 5 – *Ibid* at 23.
[53] For example, the Minister recently employed the 'on-water matters' rule of secrecy when he was questioned over whether Australian officials payed the crew of a vessel carrying asylum seekers to return them to Indonesia: Daniel Hurst, "Peter Dutton invokes 'on-water' secrecy over claim of payments to boat crew" *the Guardian Australia* (10 June 2015), online: the Guardian News and Media Limited <http://www.theguardian.com/australia-news/2015/jun/10/peter-dutton-invokes-on-water-secrecy-over-claim-of-payments-to-boat-crew>.
[54] *Border Force Act 2015* (Cth) s 42.

disclosure of protected information.[55] The significance of the extraterritorial application of the Act is striking given that the Government has explicitly extended its non-disclosure provisions to apply at the RPCs, however disavows the application of Australian law in those very territories with regard to the protection of detainees. This contradiction highlights the selective nature of the Government's approach to the operation of Australian law beyond its borders. It also reveals an inconsistent position with regards to Australian law applying extraterritorially and suggests the Government's motivation is to exclude its liability and limit transparency regarding immigration policies.

The introduction of the *Border Force Act* has been met by considerable criticism of the degree to which this constitutes censorship of personnel associated with the immigration detention regime. The legislation has been introduced during a period of concurrent reports of physical abuse and rape alleged against RPC staff and Nauruan locals.[56] The implementation of laws silencing the disclosure of information pertaining to the RPCs is particularly concerning given the nature of information revealed in recent Parliamentary reports, some of which may not have come to light without the protection of parliamentary privilege that is afforded under such inquiries.

The consequences of the *Border Force Act* were illustrated recently when François Crépeau, the UN Special Rapporteur on the Human Rights of Migrants, cancelled his planned official visit to Australia. Crépeau cited the *Border Force Act* as directly impacting on his ability to obtain relevant and honest information about Australian immigration detention.[57] The Government refused to guarantee the immunity of any individual who may disclose 'protected information' in order for the Special Rapporteur to carry out his mandate. The refusal directly contradicts the UN Human Rights Commission's 1998 terms of reference adopted by states (including Australia). The terms require states guarantee that individuals who provide information to special rapporteurs with regards to their mandate, will not suffer punishment or be subjected to legal proceedings.[58] The encounter publicly demonstrated the chilling effects of the Act on effective

[55] George Newhouse, "New laws criminalise recording information and whistle-blowing" (12 June 2015) online: Julian Burnside <http://www.julianburnside.com.au/whatsinside/uploads/2015/07/Criminalising-whistleblowing-under-the-ABF-Act.pdf> at 1.
[56] See generally: Moss, *supra* note 19; Austl., *supra* note 34.
[57] OHCHR "Migrants/Human rights: Official visit to Australia postponed due to protection concerns" *Office of the High Commissioner for Human Rights* (25 September 2015) online: United Nations <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>.
[58] Commission on Human Rights, *Report of the Meeting of Special Rapporteurs/Representatives, Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme,* UNESCOR, 54th Sess, UN Doc E/CN.4/1998/45 (1997) 36 Appendix V.

oversight and assessment of Australia's immigration detention centres. Indeed such chilling effects have been argued to be the intended purpose of the Act.[59]

The Act is one of many policy expressions which are part of a larger instrumentalisation of secrecy in the immigration detention regime. There is a fundamental need for transparency and accountability in a system that appears to be connected to, if not responsible for, serious human rights abuses. Essential information that was otherwise unknown to the public has been uncovered on the basis of former and current employee testimony through Parliamentary inquiries, investigative journalism and independent reports.[60] Disclosure of 'protected information' to parliamentary inquiries is covered by parliamentary privilege. However, the exposure of such information cannot be left solely to lengthy parliamentary processes. The disclosure of human rights abuses and violent incidents that arise out of the immigration detention regime cannot be expected of a federal government that has demonstrated a strong and vested interest in maintaining the status quo. The Australian Government has consistently indicated that its 'harsh' immigration policies are necessary in order to 'stop the boats' which in turn 'stops the deaths at sea'.[61] This rhetoric reveals the Government's approach that the ends justify the means.[62] Rigorous independent oversight of Australia's immigration detention centres and impartial and fair disclosure of information are essential aspects of immigration policies to ensure the protection of asylum seekers' rights in immigration detention.[63]

The threat of criminal sanctions of disclosure of such information means there is a real risk that incidents of sexual abuse, general maltreatment and inadequate living conditions will go unreported in the future. Federal whistle-blower legislation does little to mitigate the censorship

[59] Sarah Sedghi, "Border Force Act could see immigration detention centre workers jailed for whistleblowing" *ABC News Online* (1 July 2015) online: Australian Broadcasting Corporation <http://www.abc.net.au/news/2015-06-30/detention-centre-workers-face-imprisonment-for-whistleblowing/6584392>.
[60] See generally: Austl., *supra* note 18; Moss, *supra* note 19; Austl., *supra* note 34.
[61] Tony Abbott, "Joint Doorstop Interview, Perth" *PM Transcripts: Transcripts from the Prime Ministers of Australia* (17 May 2015) online: Department of Prime Minister and Cabinet <https://pmtranscripts.dpmc.gov.au/release/transcript-24461>.
[62] The Australian Government's position directly contradicts Immanuel Kant's influential conception of human dignity, in which he states human beings should never be treated "never simply as means, but always at the same time as an end": Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996) at s 38 of the Doctrine of Virtue (6:642). Kant's construction of human dignity, the 'categorical imperative', has been argued as the foundation and the source of modern human rights: Jurgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights" (2010) 41 Metaphilosophy 464 at 465.
[63] Independent oversight currently exists in the form of limited access granted to the Australian Human Rights Commission, who as a result of their findings released: *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*

imposed by the *Border Force Act*.[64] Firstly, the *Public Interest Disclosure Act* (PIDA)[65] does not protect individuals from recording information which may be deemed 'protected' under the *Border Force Act*.[66] It does, however, protect disclosure of information in limited circumstances. Although, the PIDA has yet to be used as a defence to a criminal charge, so its ability to protect individuals from criminal sanction under the *Border Force Act* is unclear.[67] Finally, the disclosure process under whistle-blower laws is complex in that it requires the individual to make an assessment as to whether their disclosure has been 'adequately dealt with' under internal procedures.[68] The limited protection under the PIDA as well as uncertainty of its applicability to criminal charges means individuals are unlikely to be adequately protected if they disclose 'protected information' contrary to the *Border Force Act*.

Australia's effective control over Manus Island and Nauru Regional Processing Centres

Developments in international jurisprudence make it increasingly clear that states cannot use sovereignty as a shield in order to authorise what would otherwise be actions contrary to law that occur within their own borders.[69] The doctrine of effective control has emerged as a response to the lacuna in protection of human rights which arise in circumstances of state control over territory or individuals in a third country.[70] The contrary interpretation would amount to an absurd interpretation where member states to human rights conventions could engage in acts on foreign soil which were expressly prohibited in their own territory.[71]

Traditionally, the basis for jurisdiction is the principle of territoriality.[72] As a result, departure from the territorial nature of jurisdiction is the exception to the rule and requires special justification.[73] The onerous nature of the test for extraterritorial jurisdiction can result in conduct failing to meet the threshold necessary to establish the extraterritorial operation of human rights instruments. In addition, extraterritorial migration control is inherently problematic due to the dualism of sovereignty. Nation states invoke sovereignty not only to account for the introduction

[64] Newhouse, *supra* note 55 at 3.
[65] *Public Interest Disclosure Act 2013* (Cth) [*PIDA*].
[66] Newhouse, *supra* note 55 at 2.
[67] *Ibid*.
[68] *PIDA, supra* note 65 at s 25.
[69] UNHRC, *supra* note 30; *JHA v Spain*, [2008] 41st Sess CAT/C/41/D/323/2007 UNCATOR.
[70] Gammeltoft-Hansen, *supra* note 26 at 111.
[71] *Lopez Burgos v. Uruguay*, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981, para 12(3) [*Lopez*]
[72] Gammeltoft-Hansen, *supra* note 26 at 105.
[73] *Bankovic*, *supra* note 30 at 61.

of strict migration policies but also as justification for denying responsibility for extraterritorial conduct.

International law recognises circumstances in which states can be held responsible for conduct that occurs extraterritorially. At international law, states are responsible for conduct in relation to persons who are subject to or within their jurisdiction, irrespective of whether that conduct occurred on their sovereign territory.[74] Several supervisory bodies and judicial institutions, including the UN Human Rights Committee and the International Court of Justice, have upheld this interpretation of the extraterritorial application of human rights law.[75] In this respect, the concept of territory or *where* the conduct in question occurred is less relevant. The focus of inquiry is rather the relationship between the state and the occupied physical space or the relationship with the individual whose rights have been infringed.[76] Permutations of an extraterritorial interpretation of jurisdiction can be found in multiple international human rights instruments.[77] Notably, the Human Rights Committee has referred to extraterritoriality in its interpretation of Article 2:1 of the International Covenant on Civil and Political Rights (ICCPR).[78] Australia is party to several international human rights instruments which hold that, irrespective of the territory in which a human rights violation may occur, the state party will be responsible for conduct in relation to persons who are "subject to or within their jurisdiction".[79]

Despite the fact that Australian policies and regulation created the RPCs and the transferral of asylum seekers to these alternate jurisdictions, the Government persistently asserts that responsibility for the detainees is under the exclusive control of its respective regional partners as the RPCs in which they are detained are situated on their territory. Claims about territoriality notwithstanding, international law dictates that the relevant inquiry is not directed to where the conduct in question occurred, but rather whether the conduct itself can be attributed to the foreign state by way of connection through 'effective control' which may be exercised over the

[74] *Loizidou v Turkey*, [1995] No 15318/89 ECHR, 21 EHRR 188; UN Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, *24 January 2008,* at 16.
[75] UNHRC General Comment 31, *supra* note 30 at 80; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Gen. List No. 131, 9 July 2004 at 136.
[76] *Lopez, supra* note 71 at 176.
[77] Feller, *supra* note 31 at 110; See also: Art 2(1) ICCPR; Art 1 of 1996 Optional Protocol of the ICCPR, United Nations General Assembly Resolution 2200A (XXI); Art 1 of the European Convention on Human Rights; Art 1(1) of the American Convention on Human Rights.
[78] UNHCR General Comment 31, *supra* note 30.
[79] ICCPR Art 2(1); CAT Article 2(1).

individual or the occupied physical space.[80] In the case that effective control can be determined, the individual will fall under the jurisdiction and engage the responsibility of the foreign state.

The notion that the territorial state has the primary responsibility for addressing protection needs is based on the assumption that the host state can indeed meet those obligations.[81] As developing nations, PNG and Nauru suffer from significant institutional and structural barriers that limit their ability to provide essential services to their own citizens, let alone upholding the rule of law and meeting human rights obligations in providing protection to asylum seekers detained there.[82] Australia defers to the Nauruan legal system in order to prosecute criminal allegations of asylum seekers such as the recent highly publicised allegations of rape on the island. However, the strength of the rule of law in Nauru and the capacity and willingness of law enforcement to carry out legitimate criminal investigations has been criticised as inadequate.[83] The Australian Government indirectly acknowledges this through its capacity building and support of the police force in Nauru. Similarly, the Government has consistently recognised the limitations of health care services in PNG and Nauru by transferring detainees needing specific medical attention to Australian hospitals. Acknowledgment of responsibility for asylum seekers can be imputed to the Government for example when it transfers alleged rape victims to Australia for abortions, which are illegal under Nauruan law.

The judicial system has been recognised as severely compromised by corruption and mismanagement, which culminated in the forced departure of the Chief Justice in 2014. This led legal scholars and constitutional law experts in Australia to conclude that "the rule of law in Nauru lies in tatters".[84] Further, in 2015, New Zealand suspended aid to the country citing the breakdown of the justice system and human rights protection as the reason for doing so.[85] These examples of the limitations and structural deficiencies in Nauruan law indicate that the Australian Government should have little confidence in the stability of the rule of law in Nauru and thus the ability of the country to undertake legitimate criminal and administrative

[80] *Bankovic, supra* note 30*;* Feller, *supra* note 31 at 160.
[81] Gammeltoft-Hansen, *supra* note 26 at 100.
[82] *Ibid* at 156; George Williams, "Australia must defend rule of law in Nauru" *the Sydney Morning Herald* (28 January 2014) online: Fairfax Media <http://www.smh.com.au/comment/australia-must-defend-rule-of-law-in-nauru-20140127-31ist.html>.
[83] Austl., *supra* note 34 at 19-20.
[84] Williams, *supra* note 82.
[85] Pacific Beat, "New Zealand suspends aid to Nauru's justice sector citing diminishing rule of law" *ABC News Online* (3 September 2015) online: Australian Broadcasting Corporation <http://www.abc.net.au/news/2015-09-03/new-zealand-suspends-aid-to-nauru-citing-diminishing-rule-of-law/6746202>.

investigations in respect of refugees' complaints. They also question the Australian Government's formal deferral to the Nauruan legal system to reasonably carry out criminal investigations and prosecutions. Given the Government's knowledge of these circumstances, this should oblige Australia, whom voluntarily outsources migration functions, to ensure the protection and well being of irregular migrants in immigration detention. However, Australia has continued to transfer asylum seekers to RPCs with knowledge of the persistent harm caused, and on the stated assumption that, once they arrive there, Australian liability for any actions taken in relation to the RPCs and asylum seekers, ceases.

The Australian Government as the links in the causal chain of events[86]

The structural nature of the RPCs suggest an interpretation of responsibility that *de facto* control is exercised by the Government over asylum seekers held in immigration detention. Until recently, Manus Island and Nauru RPCs remained closed facilities where detainees had no freedom of movement beyond their walls. Nauru RPC has since been declared a 'fully open' RPC, where detainees can have freedom of movement around the island nation. However, this freedom of movement remains limited on an island which is one of the smallest nations in the world and where there is known resentment from within the community towards asylum seekers. In addition, the Australian Government remains able to withdraw the open nature of detention at any time.[87]

In reality, the Manus Island and Nauru RPCs are Australian creations and Australian investments, and the Government exercises effective control over their operation and the individuals detained within them. Asylum seekers are detained at the RPCs by reason of Australian policies which mandate their transfer there. In addition, the Government pays for the running of the RPCs, trains the staff, executes memoranda of understanding with its regional partners setting the terms of the regional processing regime, enters into contracts with service providers and monitors the RSD processes at both RPCs.[88] In regards to the riots at Manus Island

[86] Austl., *supra* note 18 at 136.
[87] Daniel Hurst, "Nauru centre opening has 'dramatic effect' on detention challenge, court told" *Guardian Australia* (7 October 2015) online: Guardian News and Media Limited <http://www.theguardian.com/australia-news/2015/oct/07/nauru-open-centres-asylum-seeker-fighting-offshore-detention-high-court>; The timing and speed of this announcement coincided with a High Court challenge to the constitutional validity of offshore detention. The case, which centres around the return of a Bangladeshi woman from Australia to Nauru, may be influenced by the policy change as it affects the plaintiff's rights in detention. As a result, the announcement has been criticised as a concerted attempt by the Government to change the outcome of the case. At the time of writing, the judgment had not yet been handed down by the High Court: *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2015] HCATrans 255 (7 October 2015).
[88] Austl., *supra* note 34 at 133.

RPC in February 2014, inadequate fencing was identified as a significant contributing factor to the exacerbation of violence between detainees, locals and guards. The Australian Government, responsible for signing off on structural improvements to the RPC, failed to respond to a risk assessment from G4S prior to the riots, which had requested increased security and better fencing.[89]

The above examples of Australia's involvement in significant aspects of the regional processing regime indicate the Government's integral role in the entire process and authority of RPCs. The issue, then, becomes not whether Australia is exercising effective control over the RPCs, given the extensive scholarship and numerous reports and inquiries demonstrating this point. Rather, the concern must be the protection gap that is illustrated once effective control is demonstrated.[90] The practical effect of a positive finding of effective control is futile if the Australian Government fails to acknowledge it. Given the Government's persistent assertion of its limited extraterritorial responsibility, the absence of enforcement mechanisms at international law appears fatal to the achievement of accountability at international law.

Limitations in *lex specialis*: protection gaps in international refugee law

Offshore detention centres are held up as examples of the failure of international human rights law to protect the most vulnerable.[91] In particular, international refugee law is criticised for its apparent inability to regulate extraterritorial migration control, especially in the context of the RPCs on Manus Island and Nauru. Extraterritorial application of human rights instruments is not a new concept in international law. However, its application with regards to refugee law is underdeveloped, as jurisprudence has focused largely on human rights enumerated in other international instruments.

Unlike the specific articles of the ICCPR and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) where the interpretation of jurisdiction has been expanded in order for human rights obligations to be applied extraterritorially,[92] the

[89] Austl., *supra* note 18 at 48.
[90] It is my contention that the Australian Government exercises effective control over the Manus Island and Nauru RPCs. However, it is indeed arguable that effective control cannot be established in the present case. For the purposes of this thesis, the focus is on the unenforceability of the doctrine.
[91] Elizabeth Holzer, "What Happens to Law in a Refugee Camp?" (2013) 47 LASR Law Soc Rev 837 at 837.
[92] ICCPR Article 2(1); Convention Against Torture Article 2(1).

Refugee Convention has no comparable provision. On the contrary, the majority of rights enumerated in the Convention appear to be triggered when the individual is on the territory of the contracting state.[93] Scholars have interpreted the absence of such a provision in the *Refugee Convention* as a level of detachment between the rights accessible by individuals and the state.[94] It also serves to explain the basis on which the Australian Government excised its outlying territories from mainland Australia in order to prevent asylum seekers from making protection claims upon their arrival. The policy is a deliberate decision to circumvent protection guarantees that must be extended to refugees on Australian territory.

The *Refugee Convention* provides incremental protection based on the strength of the physical link between the individual and the state,[95] whereas the full extent of rights contained in the ICCPR and the CAT are accorded if jurisdiction is established. Responsibility is thereby attributed to the state for any act or omission carried out within its jurisdiction.[96] The notion of detachment between the state and the individual is an inherent function of extraterritorial migration control. Therefore, the structure of incremental rights distribution under international refugee law incentivises states to move migration control offshore, in order to sever the link between territory and the individual and thereby reduce obligations owed under the Convention. In light of an increase in extraterritorial migration control, the relevance of the Convention is therefore problematic as it presents significant limitations to effective refugee protection for detainees held in offshore detention.

It is perhaps the construction of the *Refugee Convention* as one which presupposes a physical connection between the individual and the state that encourages countries to export their protection obligations beyond national borders. It is clear on an analysis of the protection gap in international law regarding the Manus Island and Nauru RPCs, that the facilities are designed to avoid legal safeguards which would otherwise be in place on Australian territory.

There are, however, a remainder of rights which are available to individuals despite a lack of physical connection between the state and the individual seeking asylum. The principle of non-

[93] Thomas Gammeltoft-Hansen & James C Hathaway, "Non-Refoulement in a World of Cooperative Deterrence" (2014) 53 Colum J Transnat'l L 235 at 257.
[94] Gammeltoft-Hansen, *supra* note 26 at 101.
[95] *Ibid* at 147, 152.
[96] *Ibid* at 110; UNHRC, *supra* note 30.

refoulement is the cornerstone of international refugee law.[97] The principle dictates that a state cannot return (*refouler*) an individual where their life or freedom may be threatened by reason of their race, religion, membership of a particular social group or political opinion.[98] The doctrine is well established in international law, as it is enumerated in several treaties as well as being preserved in customary international law.[99] In addition, the right of access to courts of the contracting parties under the *Refugee Convention*,[100] as well as the prohibition on discrimination against refugees under Article 3, are available regardless of the level of attachment between the recipient state and asylum seeker. However, these excess rights are clearly insufficient to protect asylum seekers to the full extent required.

The principle of non-refoulement creates an exception to the sovereign power of a state to decide whom to expel from its borders.[101] The concern is, however, the ability of the state to reinterpret such international legal principles in the domestic context in a way in which absolves it from legal obligation. Legislative amendments to the *Migration Act* by the Australian Government give formal acknowledgment of the principle of non-refoulement.[102] However, the *Migration Act* then expressly denies its application to situations which clearly fall within its purview, that is, expulsion of irregular migrants from Australian territory without regard to such obligations. The principle is effectively made redundant by virtue of the Government's re-interpretation of the principle in domestic legislation. Australian courts are limited in their interpretation of the principle of non-refoulement by reason of the express language used by the Parliament to limit its application. Principles of international law can therefore be modified by the Parliament by plain language in the statute and the courts are restricted by any express, unambiguous language used.[103] As a result, Australian law sanctions the transfer of asylum seekers that under international law would amount to *refoulement*.

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[97] Anja Klug & Tim Howe, "The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures" in Elspeth Guild & Jan Niessen, eds, *Extraterritorial Immigration Control: Immigration and Asylum Law and Policy in Europe* (Boston: Martinhus Nijhoff Publishers, 2010) 69 at 70.
[98] *Refugee Convention, supra* note 16 at Art 33.
[99] High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, UNHCROR, (2007).
[100] *Refugee Convention, supra* note 16 at Art 16.
[101] Gibney & Skogly, *supra* note 6 at 58.
[102] *Migration Act*, *supra* note 5 at s197C.
[103] *Coco v The Queen (1994)* 179 CLR 427 [*Coco*]; This is discussed in detail in Chapter 3.

Australia continues to transfer individuals from its borders under circumstances which amount to refoulement while concurrently stating their sovereign power to protect their borders. This is not an indictment on the relative effectiveness of the principle of non-refoulement. On the contrary, by reason of the fact that Australia expressly acknowledges its non-refoulement obligations, the Government is recognising and engaging with the international human rights law system. It is however an issue of interpretation and function of the lack of enforcement of the doctrine.

The recent 'one-off' increase in Australia's humanitarian refugee intake may signify a momentary deviation from Australia's restrictive immigration policies. In response to the Syrian 'refugee crisis', the Australian Government announced that it would resettle an additional 12,000 Syrian refugees.[104] Although it is a modest intake, it represents a temporary policy shift from a government that is habitually averse to increased refugee arrivals.[105] Despite formal recognition by the Australian Government of the extent of the humanitarian crisis in Syria, emails obtained under Freedom of Information by the Guardian Australia in 2014 show Department employees actively encouraging the repatriation of Syrian asylum seekers detained on Manus Island and Nauru RPCs. The emails indicate the Department was cognisant of the fact that detainees were "adamant that [the Department] would be sending them home to their death".[106] Further, allegations that immigration detention authorities continue to pressure detainees at the RPCs to repatriate to Syria even after the announcement of the increase in refugee intake,[107] demonstrate the hypocrisy of a government responding to the crisis on the one hand, yet encouraging the return of asylum seekers to the same conflict on the other. The repatriation of Syrian asylum seekers (if successful) would most likely violate the principle of non-refoulement, as reports have revealed that returned asylum seekers have then been subject to persecution upon their arrival.[108] However, the limitations in enforcement mechanisms of international refugee law render the Government's conduct effectively free from legal sanction at the international level.

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[104] Joint media release, "The Syrian and Iraqi humanitarian crisis" *Minister for Foreign Affairs the Hon. Julie Bishop MP* (9 September 2015) online: Commonwealth of Australia <http://foreignminister.gov.au/releases/Pages/2015/jb_mr_150909a.aspx>.
[105] For example, the Government refused to resettle any Rohingya refugees in the aftermath of South-East Asia's refugee crisis in May 2015.
[106] Oliver Laughland, "Australia going to 'unthinkable' lengths to return Syria detainees, emails show" *Guardian Australia* (19 August 2014) online: Guardian News and Media Limited <http://www.theguardian.com/world/2014/aug/19/australia-going-to-unthinkable-lengths-to-return-syria-detainees-emails-show>.
[107] Ginny Stein, "The 19th Syrian: The asylum seeker the Australian Government convinced to return to a war zone" *ABC News Online* (1 October 2015) online: Australian Broadcasting Corporation <http://www.abc.net.au/news/2015-10-01/the-asylum-seeker-the-government-convinced-to-return-to-syria/6816336>.
[108] *Ibid*.

Australia's isolation from human rights jurisprudence has had a chilling effect on the nation's culture as well as our global standing as a state which protects human rights. As Former Chief Justice Sir Anthony Mason wrote regarding the absence of a Bill of Rights in Australia: "we do not have what is a vital component of other constitutional and legal systems…[it] is an ingredient in the emerging world order that is reducing the effective choices open to the nation state".[109] The previous two decades of immigration policies from successive Australian Governments serves as a reminder of the consequence of the power of a government with severely limited human rights checks and balances. The notion that a parliamentary responsible government will, under the protection of the rule of law, uphold basic human rights is undermined by the reality that the Parliament introduces the very legislation which challenge the realisation of basic human rights.[110]

In the aftermath of World War II, Hannah Arendt wrote critically of the human rights system and its failure to serve stateless individuals.[111] The potency of Arendt's words has endured, not least because of her status as one of the preeminent political philosophy scholars of the 20th Century, but, more alarmingly, because her criticism of international community failings of refugees is still applicable today.

[109] Sir Anthony Mason, "Rights Values and Legal Institutions: Reshaping Australian Institutions", (1997) 13 Aust. ILJ 1 at 13.
[110] Brian Galligan, "Australia's Political Culture and Institutional Design" in Philip Alston, ed, *Towards An Australian Bill of Rights, Centre for International and Public Law & Human Rights and Equal Opportunity Commission* (Canberra: Australian National University Publishing, 1994) at 57.
[111] Hannah Arendt, *The origins of totalitarianism* (New York: Harcourt, Brace & World, 1966) 267 - 302.

CHAPTER 2 - (De)constructing sovereignty: state power and the apparent dichotomy of irregular migration

Introduction

The traditional relationship between the nation state and migration is continually challenged by globalisation and, in more recent times, by an increase in the number of asylum seekers seeking protection from host states. This relationship is further marred by a purported dichotomy between state sovereignty on the one hand, and the reality of irregular migration on the other. The identity of a nation has long been linked to its territorial borders. Territory delimits the juridical and political system of a state and contains the coercive authority of the sovereign.[112] This is supported by the rhetoric of states, such as Australia, associating migration laws as an inherent authority of the state. One clear example of this rhetoric is the statement of former Prime Minister John Howard in the wake of the Tampa Affair that the Australian Government would "decide who comes to this country and the circumstances in which they come".[113]As calls for greater refugee protection are made in the wake of conflicts that force mass migration, the general response from prosperous nations has been to reinforce their sovereign power to exclude or limit the arrival of refugees and irregular migrants.[114]

Given the principle of sovereignty's position in international law, this interpretation of the conflict between the nation state and migration presents significant challenges to effective refugee protection and, in turn, to the realisation of fundamental human rights. It is therefore necessary to reconceptualise the notion of sovereignty not as a principle which demands exclusion of irregular migrants, but rather as one which, when properly understood, facilitates co-operation in advancing human dignity and rights in the global migration context.[115]

The first part of this Chapter will discuss Australia's historical anxieties over territorial sovereignty. Examples of 'threats' to Australian sovereignty will be highlighted in order to bring understanding to renewed Australian preoccupation towards protecting Australia's sovereignty

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[112] Jean Cohen, "Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization" (2008) 36 Polit Theory 578 at 589.
[113] TV program transcript, "Liberals accused of trying to rewrite history" *Lateline late night news and current affairs* (21 November 2001) online: Australian Broadcasting Corporation <http://www.abc.net.au/lateline/content/2001/s422692.htm>.
[114] Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67 Mod Law Rev 588 at 588.
[115] Donald Kerwin, "International Migration, Human Dignity, and the Challenge of Sovereignty" (15 October 2015) online: Centre for Migration Studies <http://cmsny.org/kerwin-migrationdignitysovereignty/>.

from ‘the Other’ – the irregular migrant. The analysis will reveal the elusive nature of sovereignty in that these historical examples failed to bring about a crisis of the concept as heralded. Further, Australia’s inconsistent application of the principle of sovereignty will expose the misconception that territorial sovereignty and humane responses to irregular migration are incapable of co-existing.

Part two of this Chapter will develop Agamben’s theory of political power in respect of detainees held at the RPCs. It will be argued that, by expressly excluding irregular migrants from Australian territory, the state in fact ‘inclusively excludes’ irregular migrants from the sovereign state. This inclusion through exclusion is achieved by an act of sovereign power (the act of controlling the exclusion and treatment of irregular migrants while detained offshore). This act of sovereign power serves to bring the irregular migrant within the control of the state as it becomes impossible to distinguish where the operation of sovereign law begins and ends. However, this post-structural account will be challenged to the extent that it holds that exclusion of ‘the Other’ is an inevitable function of state power which must be performed in order to reinforce the rights of the citizen. Agamben’s political theory will be applied to the irregular migrant example in conjunction with Matthew Flynn’s analysis of the structure of immigration detention in order to illuminate the nature of state power operating against detainees.

Finally, the third part of this Chapter will offer an alternative construction of the state-refugee relationship. Fox-Decent’s fiduciary theory will be applied to reconceptualise the origin of rights protection in a way which is less threatening to the traditional concept of state sovereignty. Purkey’s application of the fiduciary theory to the plight of effective refugee protection will illustrate the need for legal protection which arises on the basis of the inherent nature of the relationship, rather than externally imposed obligations on the state. The discussion will proceed on the basis that, although the fiduciary theory is unenforceable against the Australian Government, it suggests an important alternative conceptualisation of the relationship between the state and its legal subjects. Accordingly, the theoretical framework will set the foundation for the analysis in Chapter 3, which bares the necessary enforceable characteristics.

Sovereignty's real threat: contradictions in Australia's assertion of sovereign power

Securitisation of rights protection

Some observers discuss a 'third wave' in human rights discourse,[116] which contrasts to the post World War II era which saw the ascendency of international human rights law enshrined in treaties and declarations and applied by international tribunals. Unlike the period following World War II, which was characterised by the eagerness of states to address the moral and legal void that enabled the mass atrocities of WWII to occur, this 'third wave' of human rights discourse is rooted in the concept of securitisation.[117] In the wake of the 9/11 attacks, the 'war on terror', highly publicised terrorist attacks and civil wars, the global community has seen an increase in states' unilateral action to respond to what has been dramatically dubbed the 'age of terrorism'.[118] In this state dialectic of securitisation, the refugee is presented as a threat to security, particularly to human security within the nation. Unilateral action from *Refugee Convention* states to stem the 'tide' of irregular migration has marked the beginning of the 21st century. Similarly, political discourse justifying states' militarisation of border controls on security bases, which also works to undermine the conceptual linkages between refugees and human rights, has become relatively commonplace.

Using discourse of increased security threats and human rights protection of citizens, states have paradoxically pursued policies which serve to threaten, rather than reinforce, human rights in the international context.[119] This self-serving interpretation of human rights can be characterised as reducing otherwise inviolable human dignity as a means to an end. Evoking Arendt's analysis of citizenship as "the right to have rights",[120] we may see the distinction between the rights of citizens and non-citizens continues to apply to modern examples of state power and authority. The United States' (U.S.) Government's treatment of terror suspects in Guantanamo Bay is a key example of the effect the age of security has had on states that are willing to sideline the

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[116] Cohen, *supra* note 112 at 580.
[117] *Ibid*.
[118] *Ibid* at 581.
[119] *Ibid*. For example, in response to the recent November 2015 terror attacks in Paris, the French Government has successfully extended the state of emergency for three months. The state of emergency gives police and authorities expanded powers allowing searches and house arrests with limited judicial oversight and on the basis of perceived behaviour that threatens "security or public order", rather than any connection with a criminal offence. The French President, François Hollande, proposes to hold a vote to permanently extend emergency powers under the Constitution: Angelique Chrisafis & Julian Borger, "French MPs vote to extend state of emergency after Paris attacks" the *Guardian Australia* (20 November 2015) online: Guardian News and Media Limited <http://www.theguardian.com/world/2015/nov/19/french-mps-vote-to-extend-state-of-emergency-after-paris-terror>.
[120] Arendt, *supra* note 111 at 296.

fundamental rights of some (non-citizens in most cases), for the ostensible greater good of others ('good' citizens). During the war on terror, state-sanctioned torture of terrorism suspects often occurred extraterritorially (the practice of 'rendition'), with almost absolute legal impunity from the state carrying out the practice.[121] In relation to this topic, the Australian Government's differentiation of 'unauthorised maritime arrivals' from other migrants falls within this rubric of securitisation against irregular migration and, in turn, justifies their placement in immigration detention.

Different political eras are constitutive of states' interpretation of human rights principles. In other words, history demonstrates that the political environment within which a state operates at a point in time also dictates its degree of engagement with, and implementation of, international human rights law. This is plainly seen in the circumstances which precipitated the creation of the *Refugee Convention*. In response to the major refugee crisis which followed World War II, states co-operated to establish an international legal framework which prioritised protection and resettlement.[122] The Convention paved the way for decades of international refugee law jurisprudence, and is responsible for anchoring well-developed principles in international law such as the principle of non-refoulement. However, over 60 years after the refugee crisis which precipitated the *Refugee Convention*, the migration challenge which has been named the biggest refugee crisis since World War II (the Syrian 'refugee crisis') has yielded a completely different response from states. It is to this difficult question which we now turn. In the age of globalisation and disappearing borders, why do prosperous nations insist on closing borders to irregular migration?

The movement of large numbers of people from one poor nation to another, has the potential of creating significant security issues. Not only do poorer nations lack the infrastructure and resources required to resettle refugees and process asylum claims, refugees' presence has the ability to stir ethnic and religious tensions that may be apparent in particular societies.[123] Despite this fact, developing nations are host to significantly more refugees than industrialised

[121] US, Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program,* Committee Print (2014)
[122] Dr Sadako Ogata, "Foreword" in Paul Weis, ed, *the Travaux Preparatoires Analysed with a Commentary by Dr Paul Weis* (1990) at 1.
[123] William Maley, "Refugee Diplomacy" in Andrew F. Cooper, Jorge Heine, & Ramesh Thakur, eds, *The Oxford Handbook of Modern Diplomacy* (Oxford: Oxford University Press, 2013) 677 at 681.

countries.[124] In the context of Syria, this can partly be attributed to the proximity of Jordan, Lebanon and Turkey to the conflict. However, a country such as Lebanon with a population of four million is host to almost 1 million refugees, yet Australia boasts the acceptance of 12,000 Syrian refugees.[125] Anti-immigration sentiments and restrictive immigration policies are most prevalent in prosperous nations.[126] Yet the connection between limited resources, underdeveloped institutional frameworks and deep-rooted ethnic divides is not present in nations such as Australia.

Responses to irregular migration by nation states have become increasingly militarised. The discourse of 'border protection' has created a distortion of states' refugee protection obligations under international law. The focus has thus become 'protection from' instead of 'protection of' the irregular migrant. Attempts to curtail the securitisation of borders and offshore detention policies from human rights agencies and NGOs alike are consistently hampered not only by a lack of formal enforcement mechanisms at the international level, but more significantly, by an unwillingness of the state to deviate from policies grounded in keeping asylum seekers out.[127] As a result, states abandon their international protection obligations so as to restore 'order' to territorial borders.

Dichotomies and contradictions: Australia and territorial sovereignty

The characterisation of sovereignty as an essential element of statehood, impervious to change or adaptation is unrealistic given the pervasiveness of globalisation and inter-state conduct. States regularly engage in a surrender of sovereignty for economic benefit where traditional conceptions of borders and territory are eroded in order to facilitate greater movement of goods and services.[128] The international order has developed to a point where the movement of goods and services is far less restricted than the movement of people. It creates a precarious situation for asylum seekers, who then tend to migrate through increasingly clandestine means. The issue

[124] UNHCR, "UNHCR mid-year trends 2014" *United Nations High Commissioner for Refugees*, report (2014), at 5; Amnesty International, "Poor countries bearing the brunt" *Amnesty International News* (12 October 2015) <https://www.amnesty.org/en/latest/news/2015/10/catastrophic-moral-failure-as-millions-of-refugees-left-to-cruel-and-uncertain-fates/>.
[125] UNHCR, "2015 UNHCR country operations profile – Lebanon" *United Nations High Commissioner for Refugees* (December 2014) <http://www.unhcr.org/pages/49e486676.html>.
[126] United Nations Regional Information Centre for Western Europe, "New report: Developing countries host 80% of refugees" online: the United Nations <http://www.unric.org/en/world-refugee-day/26978-new-report-developed-countries-host-80-of-refugees->.
[127] Purkey, *supra* note 25 at 693.
[128] William Maley, "Asylum-seekers in Australia's international relations" (2003) 57:1 Aust. J. Int. Aff. 187 at 189.

is one of misrepresentation, as the politics of sovereignty characterises the migrant as a threat to the nation.

On the Australian Government's own admission, the power to enter into treaties and agreements with other nations is a state prerogative, and involves a necessary capitulation of sovereignty.[129] Liberal democracies routinely enter into agreements and cede sovereignty in order to achieve desired international co-operation in treaty making. These limits are justified by the benefits which flow to individuals and the state by ensuring greater standardisation of rights protection. From this perspective, sovereignty is in fact compatible with the pursuit of human dignity and rights.[130] However, a narrow interpretation of the principle of sovereignty has also nurtured the fiction that the state *must be* safeguarded from incursions to its territorial borders in the form of irregular migration. The entering into express agreements with other nations, such as the *Refugee Convention*, is an act of sovereign power in itself. Yet Australia continues to subvert the obligations it voluntarily agreed to in the name of protecting the integrity of its borders. There is a fundamental disconnect between Australia's voluntary ratification of the *Refugee Convention* as an attempt to define the scope of Australia's treatment of refugees, and the recent unilateral redefinition of its obligations under domestic legislation.

Successive Australian governments have criticised unscrupulous people smugglers for taking advantage of the migration industry and capitalising on individuals' vulnerability and suffering.[131] Yet the same can be said for the regional processing regime where private companies provide services which are essential in maintaining the RPCs. These service providers benefit from the existence and sustainability of the offshore detention regime. The culture of secrecy, lack of transparency, and apparent impunity at Australia's RPCs can only be described as a framework designed to take advantage of the *status quo*. The paradoxical line of reasoning from the Government is highlighted where it criticises people smugglers for capitalising on

[129] Department of Foreign Affairs and Trade, "Treaty making process" (16 February 2016) online: Commonwealth of Australia <http://dfat.gov.au/international-relations/treaties/treaty-making-process/pages/treaty-making-process.aspx>.
[130] Kerwin, *supra* note 115.
[131] Kevin Rudd, "Transcript of doorstop interview: Government House, Lifehouse at RPA; Ashmore Reef boat incident" *Parliament of Australia* (17 April 2009) online: Commonwealth of Australia <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FB2RV6%22>; Julia Gillard, "Transcript of joint press conference" *Parliament of Australia* (13 October 2011) online: Commonwealth of Australia <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1162009%22>.

asylum seekers' vulnerability on the one hand, yet protects and (arguably) excuses sub-contractors embroiled in allegations of detainee abuse on the other.[132]

The Government is inconsistent in its approach to securing the safety of asylum seekers. Adding to the demonisation of people smugglers, the Government rationalises strict border control in order to slash the business model of the people smugglers.[133] However, in 2015, reports emerged that the Australian Government authorised the payment of $31,000 U.S. dollars to people smugglers en route to Australia in exchange for turning the boat back to its point of departure.[134] The Government refused to deny the allegations. The rationale for militarisation of border control appears to be excluding asylum seekers from Australian territory at all costs, rather than any attempt to derail people smuggling or ensure safety of asylum seekers. This directly undermines the rhetoric from the current and previous Australian governments that regional processing is a necessary means to prevent human rights abuses that arise out of the people smuggling trade. This reveals the *realpolitik* position from the Government where the true motivation is to prevent asylum seekers from reaching Australian territory.

The Australian Government justifies its hard-line approach to irregular migration by pointing to the relative success of the reduction of arrivals to Australia's borders.[135] By 'protecting' Australia's borders from irregular migration, lives are no longer lost at sea and orderly processing of refugee claims can return, according to the Government. However, there is little empirical evidence to suggest that strict migration policies reduce the flow of irregular migration.[136] On the contrary, restrictive migration policies may in fact encourage irregular migration, creating incentives to utilise the services of people smugglers in order to evade the

[132] Matthew Flynn, "Bureaucratic Capitalism and the Immigration Detention Complex" (2015) Global Detention Project Working Paper No. 9 1 at 10.
[133] The Australian, "Malcolm Turnbull admits Coalition border policies harsh" *National Affairs* (7 May 2014) online: the Australian <http://www.theaustralian.com.au/national-affairs/immigration/malcolm-turnbull-admits-coalition-border-policies-harsh/story-fn9hm1gu-1226908408949>.
[134] Claire Phipps, "Did Australia pay people-smugglers to turn back asylum seekers?" *Guardian Australia* (17 June 2015) online: Guardian News and Media Limited <http://www.theguardian.com/world/2015/jun/17/did-australia-pay-people-smugglers-to-turn-back-boats>.
[135] Janet Phillips, "Boat arrivals and boat 'turnbacks' in Australia since 1976: a quick guide to the statistics" *Parliament of Australia* (11 September 2015) online: Commonwealth of Australia <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/BoatTurnbacks>.
[136] Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCROR, UN Doc PPLA/2011/01.Rev.1 (2011) 1 at 1.

limitations implemented by the state.[137] It is a logical conclusion that restrictive migration policies can do little to address the 'push factors' such as war, persecution and torture, and therefore fail to prevent individuals fleeing these environments. If the Australian Government's goal in protecting sovereignty is to maintain the control of territorial borders, it would better serve the interests of the state to recognise the inevitability of migration and facilitate ordered, regulated migration channels, rather than incentivising the use of underground channels.[138]

Closing borders completely is neither practically possible, nor is it desirable as it does not in fact lead to the 'control' sought by states over their borders. The counter argument could, however, be made that Australia has 'stopped the boats' and therefore restored control by stemming the arrival of irregular migrants to Australian territory.[139] With respect to the celebrated 'success' of Australia's strict immigration policies, asylum seekers are still fleeing their countries of origin, however, they are being intercepted elsewhere. Due to the nature and secrecy of Operation Sovereign Borders, there is little information as to how many asylum seekers arrive and where they are intercepted.

The selective nature of the Australian Government's deference of the principle of sovereignty undermines the state's tenuous justification for limited responsibility for individuals detained at the RPCs. Australia asserts that, in respect of Nauru and PNG sovereignty, the respective states maintain legal responsibility for the RPCs. However, the Government's removal of Australian officials from the Manus Island RPC who were subject to criminal investigations, reveals a questionable devotion to PNG sovereignty. The criminal investigations centred on allegations that Australian guards drugged and sexually assaulted a local woman on the island.[140] The Manus Island Police claimed they sent repeated requests to the Australian Government to "respect the country's sovereignty", however the Government returned the individuals to Australia.[141] The

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[137] François Crépeau, "Banking on mobility to regain control of EU borders" *End of Mission Statement Migrants and the Mediterranean: UN rights expert on human rights of migrants follow up visit to Brussels for further development of his study on EU border management* (5 February 2015) online: United Nations Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15544&LangID=E>.
[138] *Ibid*.
[139] Recalling Kant's categorical imperative, the ends cannot justify the means where human dignity is compromised on the basis of strict immigration policies in order to protect the sovereignty of the nation.
[140] Liam Cochrane, "Rape investigation deadline passes as tensions rise on Manus Island" *ABC News Online* (31 July 2015) online: Australian Broadcasting Corporation <http://www.abc.net.au/news/2015-07-30/rape-investigation-deadline-passes-amid-tensions-on-manus-island/6661054>.
[141] Liam Cochrane, "Australian Manus Island guards found naked with local woman sent home before drug investigation, PNG police say" *ABC News Online* (28 July 2015) online: Australian Broadcasting Corporation <http://www.abc.net.au/news/2015-07-27/manus-island-guards-sent-home-before-drug-investigation/6651710>.

cornerstone of state sovereignty is the operation of law to the exclusion of all others in a state's territory.[142] A state may therefore carry out criminal investigations against foreign nationals whom are suspected of committing a crime in their territory. Although PNG's claims are challenged by Australia, the Government's refusal to return the individuals to PNG demonstrates an inconsistent approach to the principle of state sovereignty at best, and a complete disregard for the rule of law in PNG at worst. It is a paradoxical scenario where the Government insists on the primacy of state sovereignty in regards to the operation of PNG (or Nauruan) law to the exclusion of other states' (such as Australia), yet failed to recognise PNG sovereignty in a situation where PNG law should, according to the Australian Government, have taken precedent.

The Australian Government's rhetoric espouses a particular interpretation of sovereignty that values protecting Australia's territorial borders and maintaining control over their operation. However, under successive immigration policies, Australian borders have shifted considerably. The Government has both contracted territory, by excising areas from the 'migration zone', and expanded borders, by allocating space within third country territory for immigration detention and refugee status determination.[143] These policy machinations are ostensibly justified as a necessary response to the arrival of unauthorised maritime arrivals and are a clear statement of sovereign authority.[144] However, they also represent a fracturing of sovereign control in that traditional borders are shifted, excised and offshored in an attempt to limit irregular migration.

Absolute border control, in the form of 'closing borders' and preventing irregular migration, is an unsustainable ideal, as illustrated by the multiple challenges and political and public resistance to Australia's regional processing regime. 'Control' over irregular migration may be more accurately achieved by regulated migratory channels, accepting refugee claims through ordered, onshore processing. The increase in Australia's humanitarian refugee intake in 2015, although an *ad hoc* policy response to an international crisis, arguably supports the appearance of control and sovereign authority more so than an Australian Navy ship intercepting asylum seekers and transferring them to RPCs. However, the mechanism by which the select refugees will arrive in Australia supports the Government's rhetoric of the imaginary orderly queue for

[142] *Case of the Island of Palmas*, [1928] R.I.I.A Vol II. 4 Permanent Court of International Justice at 838
[143] Prem Kumar Rajaram & Carl Grundy-Warr, *Borderscapes: Hidden geographies and politics at territory's edge* (Minneapolis: University of Minnesota Press, 2007) at 206.
[144] *Ibid*.

refugees.[145] Reactionary and defensive policies such as Operation Sovereign Borders are temporarily effective in 'stopping the boats', but only in stopping boats from arriving in Australian waters, not stopping their departure in the first place or stopping their journey to other ports. Rather than fashioning policy responses against the backdrop of securitisation of borders, long-term strategies which accept the certainty of migration would likely provide both a humane and effective response as well as restoring the 'order and control' to borders which is so desperately sought by states.

Historical anxieties: Australia's hold on sovereignty

The Australian national identity is marked by political events which challenged and shaped the political and legal landscape of the country and which provide further understanding to renewed anxieties over Australian sovereignty. One striking example is Australia's independence from the British Crown. Remarkably, despite over eight decades since federation, it was not until 1986 that Australia gained complete independence from the British parliaments and courts. A combination of Australian and British legislation, including the *Australia Acts*,[146] removed both the application of British law to Australia and the ability to appeal from Australian courts to the British Privy Council.[147] The Act was the final crucial step in recognising Australia as an independent, sovereign nation. Although prior to 1986 there were only residual links to Britain,[148] this relatively recent abandonment of colonial dependency may partly explain Australia's aggressive assertion of sovereignty.

Australia's colonial history challenges the nation's claim to sovereignty as an exhaustive territorial space which is firmly rooted in tightly managed geographical borders.[149] Significantly, unlike other colonial countries such as New Zealand, Canada and the United States, Australian settlers declared the territory *terra nullius* (no man's land), a policy which permitted settlers' claims to title over all land upon arrival.[150] It was not until the landmark constitutional case of

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[145] Shalailah Medhora, "'Nope, nope, nope': Tony Abbott says Australia will take no Rohingya refugees" *Guardian Australia* (21 May 2015) online: Guardian News and Media Limited <http://www.theguardian.com/world/2015/may/21/nope-nope-nope-tony-abbott-says-australia-will-take-no-rohingya-refugees>.
[146] *Australia Act 1986* (Cth).
[147] National Archives of Australia, "Australia Act 1986" (2015) online: Australian Government National Archives of Australia <http://www.naa.gov.au/visit-us/exhibitions/federation-gallery/australia-act.aspx>.
[148] William M C Gummow AC, "Book review: The Australia Acts 1986 by Anne Twomey" (2011) Syd LR 319 at 319.
[149] Rajaram & Grundy-Warr, *supra* note 143 at 210.
[150] *Ibid*.

Mabo[151] in 1992 that reversed the legal fiction that colonisation extinguished Indigenous Australians' native title rights. As a result, the law recognised that, under limited circumstances, Indigenous Australians have legitimate claims to land and water rights.

What has become a deep-rooted fear and reluctance towards migration must be understood against the historical backdrop of a nation which has long possessed a tenuous hold on territorial sovereignty. Rajaram and Grundy-Warr draw parallels between Australia's widespread disproportionate policy response to irregular migration and the historical anxiety over claims of native title by Indigenous Australians.[152] The recurring hostile response to 'outsiders' may provide some background to the anti-immigration sentiments in Australia, and reveals a deeper 'us vs. them' cultural fabric.

The relationship between the state and the individual fundamentally changed in the late nineteenth century as a result of widespread democratisation.[153] The realisation of citizen rights, which forged a stronger connection between the individual and the state, provided new impetus to identifying who was 'in' and who was 'out' in order to determine membership and thus the benefits that flowed from the state.[154] As William Maley explains, the notorious White Australia Policy is Australia's earliest example of excluding non-citizens. In order to preserve British dominance, a series of legislative amendments to migration law at federation, collectively known as the White Australia Policy, gave preference to white immigrants and placed a series of restrictions on immigration, particularly from the Asian continent.[155] It was not until 1958 that the White Australia Policy was completely abandoned which paved the way for the introduction of the *Racial Discrimination Act*.[156]

These examples reveal Australia's dogged pursuit of sovereignty despite having historically received challenges and 'threats' to its territorial predominance. In addition, they illustrate the futility of 'closing borders' as it is clear that even internal challenges to sovereignty cannot be prevented, nor (in most cases) are they as destructive as originally perceived. The assertion that

[151] *Mabo v Queensland [No 2] (1992)* 175 CLR 1 [*Mabo No. 2*].
[152] Rajaram & Grundy-Warr, *supra* note 143 at 211.
[153] Maley, *supra* note 128 at 189.
[154] John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press) at 56.
[155] National Archives of Australia, "Immigration Restriction Act 1901 (commonly known as the White Australia Policy" online: Commonwealth of Australia <http://www.naa.gov.au/collection/a-z/immigration-restriction-act.aspx>.
[156] *Racial Discrimination Act 1975* (Cth).

irregular migration poses a threat to sovereignty, and therefore to Australia, is undermined when it is underscored that multiple 'threats' to sovereignty have previously challenged the nation without affecting the ability to govern nor exercise control over territory.

Inclusively excluded: refugees outside the protection of the law?

The Government's response to irregular migration is rooted in exclusion of asylum seekers from Australian territory. Recalling the trademarks of current immigration policies, including militarisation of border control, excision of territory, refusal to resettle any unauthorised maritime arrivals in Australia and mandatory detention in third countries, it is evident that the Government has successfully excluded irregular migrants from Australian territory. These measures serve to cast the asylum seeker outside the ambit of the Australian legal system and suggest that they do not merit the protection of the law. This construction accords with the Government's assertion that legal protection is not owed outside Australian territory, and therefore responsibility falls upon the Government's regional partners hosting the RPCs.

The Australian Government's migration policies place asylum seekers in RPCs, ostensibly beyond the reach and protection of Australian law. The legal systems of Papua New Guinea and Nauru have proved to be ill equipped to provide adequate protection to asylum seekers in addressing the systemic patterns of abuse at RPCs. The limitations in international law in respect of effective refugee protection present fundamental challenges in terms of safeguarding the rights of asylum seekers detained at the RPCs. This analysis of the protection gap in international law has led to claims that the RPCs operate within a legal vacuum, outside the protection of the law.[157]

Giorgio Agamben's political theory of state power is influential in depicting the origins of immigration detention and its correlative restriction of asylum seekers' rights. Agamben illustrates the power of the sovereign to distinguish between what he calls *homo sacer* or 'bare life', those that threaten the sovereignty of a nation and are therefore cast out from its legal protection, and those who do not.[158] The contrast between the 'depoliticised', bare life on the one hand, and the 'politicised' life of the citizen on the other, is central to Agamben's thesis. This citizen/non-citizen dichotomy informs Agamben's account that the power of the state to provide

[157] Rajaram & Grundy-Warr, *supra* note 24 at 40.
[158] Agamben, *supra* note 23 at 8.

rights and freedoms to citizens is based on the denial of those same rights and freedoms to others.[159] In the exercise of sovereign power, the state creates 'zones of exception' in which bare life is cast out and held in contrast to the non-exempted citizen. In this way, the sovereign constitutes itself through 'inclusive exclusion'.[160] In other words, the creation of zones of exception is necessary in order to reinforce the power and legitimacy of the sovereign. The distinction between inclusion in, and exclusion from, the sovereign therefore becomes superficial as the existence of one depends on the exemption of the other.

Agamben's post-structuralist approach has been employed to describe increasingly militarised immigration policies and in particular, Australia's immigration detention centres.[161] By transferring asylum seekers offshore to RPCs on the sovereign territory of third countries, the Government delineates specific physical spaces of exclusion from the legal order. The RPCs represent a graphic example of 'zones of exception' through which the 'depoliticised life' – the asylum seeker – is excluded from Australia.[162] In these zones, the asylum seeker can be sufficiently controlled by the sovereign, whose rights and identity are restricted by sovereign law.[163]

Rajaram and Grundy-Warr derive their analysis of state power regarding the detention of irregular migrants from Agamben's political theory. The authors argue that inherent in sovereign power is a desire to preserve homogeneity of the state. Migration, and the irregular migrant in particular, threaten the sovereign's ability to govern the homogenous majority and is therefore a threat to the norm.[164] At the same time, the depoliticised other – the asylum seeker – is essential to the system in order to define and reinforce the legal order which does not apply to her.[165] In the creation of zones of exception, the sovereign law defines where it does not operate, and thereby strengthens its identity and in turn its zones of operation within sovereign territory. The distinction between inside and outside the law thus becomes blurred, as the zones of exception are integral to the system in that it is created by reason of the fact it is excluded by the territory in which it operates.[166] Simply put, the characterisation of 'us' and 'them' with respect to the

[159] Flynn, *supra* note 132 at 6; Rajaram & Grundy-Warr, *supra* note 24 at 36.
[160] Agamben, *supra* note 23 at 7.
[161] Rajaram & Grundy-Warr, *supra* note 24 at 42-48.
[162] Flynn, *supra* note 132 at 6.
[163] Rajaram & Grundy-Warr, *supra* note 24 at 41.
[164] *Ibid* at 36.
[165] *Ibid*.
[166] *Ibid* at 37.

applicability of sovereign law is eroded by a positive act of the sovereign to exclude itself from operation in third country territory. By highlighting the blurring between territorial spaces of operation, the authors demonstrate the interrelation between distinct concepts of Self and Other and in turn, reiterate the citizen/non-citizen dichotomy of the state.[167]

Agamben criticises the inadequacies of the human rights regime and avers that the refugee should be distinguished from the concept of human rights. In summarising the ascendency of international human rights framework in the aftermath of World War II, Agamben demonstrates that the individual whom arguably embodies all the hallmarks of the need for human rights protection – the refugee – instead has marked "the radical crisis of the concept".[168] The author's characterisation gives weight to the argument that the system designed to advance human rights protection is failing in its protection of those most vulnerable.[169]

Limitations of the 'refugee as homo sacer'

The post-structuralist account of political theory is useful in analysing the inclination of states to invoke the sovereign power to exclude 'the Other'. In the context of international refugee law, it serves to illuminate the operation of the state within 'zones of exception' – immigration detention centres. However, the Agambenian account is problematic in achieving the desired accountability for human rights abuses on behalf of the state for several reasons, which are set out below.

First, poststructuralists opine that the territorialisation of human life in immigration detention centres restricts the rights of asylum seekers and denies access to justice, concluding that: "the refugee is outside the law".[170] It is true that the Government restricts the rights of asylum seekers held in detention in the RPCs. Immigration detention at the RPCs is predicated on excluding irregular migrants from the protection of Australian law. In addition, the systemic human rights abuses stemming from offshore detention are notorious and detainees continue to have limited access to justice and legal remedy owing to their remote location and restricted contact with legal representation. However, despite these undeniable deficiencies, the refugee does not exist outside the law. Refugees and asylum seekers retain legal personality through their inalienable

[167] *Ibid*.
[168] Giorgio Agamben, *Means without end: notes on politics,* Series: Theory out of bounds v. 20. (Minneapolis: University of Minnesota, 2000) at 18.
[169] Agamben, *supra* note 23 at 160; Arendt, *supra* note 111 at 370.
[170] Rajaram & Grundy-Warr, *supra* note 24 at 41.

civil rights.[171] It is Australia's legal system that has forced their exclusion from the state as an explicit exercise of sovereign power, but this does not preclude access to legal remedies for breach of civil rights.

Rajaram and Grundy-Warr critique the territorial limitation of human rights. The authors discuss the superficial distinction between rights within and outside a territory, which becomes blurred as the existence of 'inside' depends on comparison with, and relation to, the 'outside'.[172] The territorial justification for the limitation of state responsibility is thereby eroded. As it is the state that is restricting the inclusion of asylum seekers and refugees from the protection of Australian law through exclusionary immigration policies, the boundaries of who is 'inside' and 'outside' the reach of law is distorted.

Second, whereas poststructuralists posit that the refugee exists outside the law, we may see that by placing the refugee ostensibly outside the law, the state controls the refugee and simultaneously brings her within the ambit of the law. Paradoxically, the law operates to exclude from the law. However, I contend that it is not successful in achieving complete exclusion. Consequently, the Australian Government's claim of immunity from liability based on the territorial sovereignty of third countries is unsustainable. As will be shown in Chapter 3, this 'central element of control'[173] is directly relevant in determining the liability of the Government for violations of the civil rights of asylum seekers.

A third limitation of the poststructuralist approach is the assumption that in order to maintain sovereign power, the state must uphold the citizen/non-citizen dialectic. In other words, the exclusion of depoliticised life and denial of rights and freedoms of 'the Other' reinforces the inclusion of the citizen and her access to protection of rights from and by the sovereign.[174] If this position is accurate, it follows that there is a certain inevitability that the state will deny rights and freedoms in this way to asylum seekers. However, as Flynn demonstrates in his critique of this position, if that were so, the inverse would be true where the failure to offshore irregular migrants would weaken state sovereignty and would compromise the rights owed to citizens.[175]

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[171] Wilsher, *supra* note 33 at 302.
[172] Kumar & Grundy-Warr, *supra* note 24 at 34.
[173] *Burnie Port Authority v General Jones Pty Ltd* 179 CLR 520 [*Burnie Port Authority*].
[174] Kumar & Grundy-Warr, *supra* note 24 at 36.
[175] Flynn, *supra* note 132 at 6.

Based on the discussion in the previous part of this Chapter, we have seen that upholding rights of 'the Other' does not necessarily weaken sovereign power.

Lastly, the poststructural view fails to take into account examples of states strengthening their sovereign power through effective, humane responses to irregular migration. In this respect, Germany is a notable exception to prosperous states' hostility towards asylum seekers and stands in stark contrast to Europe's current crisis of solidarity with respect to co-ordinated, effective refugee protection. If the sovereignty/irregular migration dichotomy is true, Germany's acceptance of an estimated 800,000 refugees over the next year should spell the end of control over its borders and ultimately threaten the sovereignty of the nation. Although the effects of the increase in refugee intake is yet to be seen, it would be a stretch to predict that the inclusion of hundreds of thousands of refugees would represent a weakening of German sovereignty and diminish the ability of the state to extend rights and freedoms to its citizens. Rather, the German approach is a model that, in effect, re-establishes the idea of sovereignty as one which serves the interests of a nation, upholds sovereign laws as well as respecting the human rights of those who seek refuge there.[176]

Agamben discusses the failure of the international system to protect the human rights of migrants and, as a result, we must redefine our understanding of human rights and the refugee. However, the focus on the failures of international law and the inadequacy of human rights to protect refugees ignores the actors within the system and their contribution to the way in which policies are interpreted and applied. Flynn levels criticism at the post structural accounts in that they: "fail to associate the concrete conditions to which actors respond, frame, and legitimate state power".[177] In other words, the policies are less a necessary by-product of the exercise of sovereign power, but more a consequence of the organisational structures of immigration detention. There are indeed significant shortcomings in the human rights system, many of which are due to lack of enforcement measures. But to criticise the system as creating a legal void without analysing the role of the key actors within that framework is to deny asylum seekers their legal personality and prevent redress for violations of civil rights.

[176] The German Chancellor, Angela Merkel, has herself expressly referenced the country's legal and moral responsibility to provide protection to refugees: Will Hutton, "Angela Merkel's humane stance on immigration is a lesson to us all" *Guardian Australia* (30 August 2015) online: Guardian News and Media Limited <http://www.theguardian.com/commentisfree/2015/aug/30/immigration-asylumseekers-refugees-migrants-angela-merkel>.
[177] Flynn, *supra* note 132 at 7.

The problem is not merely a failure of human rights protections – although the limitations of the system are indisputable – but rather the organisational structure of Australia's regional processing regime which permits human rights abuses to occur. Lac of transparency, secrecy and hierarchical structures discourage reporting of abuse and foster an environment of ambivalence and a culture of impunity at the RPCs. It is this structure which must be targeted in order to improve immigration detention standards and ensure actors within the system respect the fundamental rights of asylum seekers. Asylum seekers' rights are limited and access to justice is restricted, however "an alien does not stand outside the protection of the civil and criminal law".[178]

The reality in Australia is a system that is intentionally designed to limit accountability for irregular migrants in turn provides little scope for a relationship of legal responsibility towards them.[179] Agents who interact with asylum seekers on a daily basis at the RPCs are limited in their power to uphold and promote their rights. This restriction stems from the power of the state which allocates the resources, trains personnel, creates the policy framework in which both exist and has the authority to intervene and make final decisions on just about any matter.[180] Further, the incentive to treat asylum seekers with dignity and respect their fundamental rights is reduced by the system which has successfully dehumanised their identity. The result is a system which perpetuates the 'othering' of asylum seekers as perennial outsiders.

The proper construction of the Government's coercive power to exclude irregular migrants from the protection of Australian law is therefore a fusion of both poststructuralist perspectives and the theoretical account advanced by Flynn which focuses on the structural nature of RPCs and the role of actors within them. The resolution of these two approaches provides a theoretical middle ground which is to be preferred. The logical conclusion is then reached that, although the state creates 'zones of exception' to exclude the refugee from legal protection, the refugee does not exist entirely outside the law. Based on the concept of inclusion through exclusion in zones of exemption, and on an analysis of the role of actors in the creation and maintenance of the RPCs, sufficient control is imputed on Australia so as to warrant the Government's legal responsibility for detainees.

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[178] *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 78 ALJR 1056, [21] (Gleeson CJ) [*Behrooz*].
[179] Rajaram & Grundy-Warr, *supra* note 24 at 40.
[180] Austl., *supra* note 34 at 13.

Reconceptualising the relationship between the state and the refugee

In the previous parts, we examined different justifications advanced by the Australian Government for third country processing. The theory of state sovereignty was deconstructed in order to overcome the perceived restriction it imposes on irregular migration and the legal accountability of a state for its extraterritorial conduct. Inherent contradictions in Australia's account of sovereignty were revealed and as a result, the Government's justification for limiting liability for harm suffered by asylum seekers was undermined. Although the discussion provided a theoretical account of state power to detain irregular migrants, the analysis has not proposed a means of opposing or dismantling the Government's immigration detention policies. The inquiry explored was not sufficient to enforce legal accountability or achieve a remedy for the harm suffered by asylum seekers detained at the RPCs.

This part will present a reconceptualisation of the *legal* relationship between the state and the refugee. Fox-Decent's concept of the state as fiduciary will be advanced in order to overcome the limitations to effective refugee protection posed by enforcing external obligations on states. Purkey offers an account of the fiduciary theory with regards to the state-refugee relationship, which is grounded in the inherent obligations owed as a result of the vulnerability of the refugee to the state.

The ability of the human rights regime to provide adequate protection for citizens and non-citizens has come under critical scrutiny in light of incidents such as the United States' justification for, and apparent immunity from, 'enhanced interrogation techniques' which may be interpreted as state-sanctioned torture. Joseph Raz critiques whether human rights can ever be truly universal where, according to his account, the legality and consequence of breaching human rights depends entirely on a state's decision to uphold them.[181] This argument may be advanced in the context of Australia's treatment of asylum seekers. As a self-proclaimed good international citizen, Australia has ratified many of the core human rights treaties. However, Australia's human rights framework remains relatively idle, owing to the absence of a Bill of Rights and the reliance upon the parliament to incorporate international law into domestic legislation, which is not an automatic consequence upon ratification. We have seen that Australia

[181] Joseph Raz, "Human Rights Without Foundations," in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) at 19; Evan Fox-Decent & Evan J Criddle, "The Fiduciary Constitution of Human Rights" (2009) 15 Leg Theory 301 at 309.

has been widely criticised for evading its legal responsibilities under the *Refugee Convention* and international law generally. Despite mounting domestic and international criticism, the Australian Government maintains that it continues to act in accordance with international human rights law. Accordingly, the Government reinforces Raz's account that the state is the arbiter of the legality of its own conduct in respect of international human rights obligations.

Raz's account is instructive if human rights obligations are perceived as originating from external instruments. However, the fiduciary theory suggests that rights emanate by reason of the inherent relationship of trust between the state and the individual, rather than from external instruments.[182] This alternative construction of the source of obligations presents the state in a fiduciary capacity, exercising power over vulnerable agents. By ceding the administration, adjudication and vindication of their rights to the state, legal subjects can reasonably expect the state to act in their best interests.[183] As the state's authority to govern and represent its legal subjects is predicated on its fiduciary obligation, it violates this obligation if it fails to discharge the duty to respect and uphold human rights.[184] The advantage to the situation of the refugee becomes apparent where the origin of human rights is based on the legal relationship between the state and the individual. The obligation to safeguard those rights is therefore a necessary consequence of the normative function of the exercise of sovereign power, rather than an external imposition of a duty to uphold international law obligations.[185]

The fiduciary theory has particular application to the relationship of the refugee and host state. Purkey provides a comprehensive account of the human rights protection born out of the fiduciary obligation of the state to the refugee. Importantly, Purkey offers an alternative construction of the sovereignty/irregular migration dichotomy. Whereas the state claims irregular migration is a threat to state sovereignty, the suggestion is that the protection of refugee rights in fact reinforces state sovereignty as it represents an expression of state power which flows directly from the state's fiduciary obligations.[186]

The relationship between the Australian Government and irregular migrants possesses the essential hallmarks of a fiduciary relationship. The vulnerability of irregular migrants to state

[182] *Ibid* at 315; Purkey, *supra* note 25 at 702.
[183] Evan Fox-Decent, *Sovereignty's Promise: the State as Fiduciary* (Oxford: Oxford University Press, 2011) at 111.
[184] Fox-Decent & Criddle, *supra* note 181 at 326.
[185] *Ibid* at 310.
[186] Purkey, *supra* note 25 at 695.

power is evident in the Australian Government's exercise of discretionary power over 'unauthorised maritime arrivals'. The administrative nature of immigration detention triggers the fiduciary obligation of the state in that it is a discretionary exercise of administrative power which compromises the interests and rights of irregular migrants and creates an environment of absolute dependence upon the state to provide for their needs.[187] The vulnerable status of irregular migrants in immigration detention is demonstrated by the fact they are unable to determine and meet their own needs and are incapable of challenging the coercive powers held by the state.

As the policies of the Australian Government with respect to irregular migration consistently demonstrate, states are capable of unilateral action with respect to refugees in spite of treaty obligations. This is largely because the implementation of treaty obligations depends upon the capacity and willingness of the state to self-impose these obligations and incorporate them into domestic law. Rethinking the origin of rights protection as a product of the relationship between the state and the refugee on its territory circumvents the limitations in enforcing international instruments.[188] From a theoretical standpoint, refugee protection can be enhanced by this alternative interpretation of the source of obligations owed to refugees by the state.

The fiduciary theory in Australia and the recurring issue of enforcement

The fiduciary theory offers an important theoretical contribution which illuminates the state's relationship with the rule of law and the legal subjects it governs. However, the effectiveness of the theory must be qualified in several important respects for this analysis. Fox-Decent declares that the fiduciary theory arises from the state's exercise of sovereign power. Therefore, state obligations are enlivened despite "the absence of any pre-existing right to be the subject of the legal order".[189] This position could apply to the situation of the refugee who, as a non-citizen, has no pre-existing connection to the host state other than her status as refugee. However, as discussed in Chapter 1, the rights emanating from the *Refugee Convention* assume a territorial link between the two parties. On its face, although the state is exercising sovereign power in expelling asylum seekers to RPCs, the fiduciary obligation requires a territorial connection between the state and the refugee. The theory may apply only to the extent that asylum seekers are within Australian territory. Purkey's analysis of the fiduciary nature of the state-refugee

[187] Fox-Decent & Criddle, *supra* note 181 at 259.
[188] Purkey, *supra* note 25 at 702.
[189] Evan Fox-Decent, "The Fiduciary nature of state legal authority" (2005) 31 Queen's L.J. 259 at 310.

relationship appears to premise a territorial connection where she says: "within the context of a fiduciary relationship, states owe refugees *within their borders* a heightened duty of care".[190] However, considering the level of control exercised by the Australian Government over the RPCs as demonstrated in Chapter 1, it is possible the fiduciary obligation could be imputed on the Government by reason of its extraterritorial conduct, thereby overcoming the perceived limitation of territoriality. In this way, asylum seekers within Australia's *jurisdiction* may, theoretically, enliven the fiduciary obligation of the state.

Despite the relevance of the fiduciary theory to effective refugee protection, it has not been recognised by Australian courts and therefore does not form the basis of an enforceable legal relationship.[191] Returning to the decision of *Mabo*,[192] the indigenous people of Murray Island argued that the state of Queensland owed them a fiduciary duty by reason of their relationship with the people, and therefore had an obligation to safeguard their rights and interests in relation to the land.[193] The court rejected this construction of the duty and instead found that the state Act that attempted to extinguish their rights was unconstitutional on the basis of its inconsistency with the *Racial Discrimination Act* rather than a breach of any fiduciary duty.[194]

Notwithstanding the enforcement limitations of the fiduciary theory in Australia, it represents a positive contribution to reconceiving the nature of the state, its relationship to the rule of law and its relationship with individuals who are vulnerable to its power. As Chief Justice French of the High Court recently commented, from an ethical perspective the theory can inform a framework in order to define the nature and the scope of the relationship of a state and its subjects.[195] As we will see in Chapter 3, the fiduciary theory is comparable to, and shares essential elements with, a tort duty of care. Both centre on the vulnerability to state power and the dependence of agents upon the state to vindicate their rights. Both regulate the exercise of the state's sovereign power over individuals. However, as Fox-Decent explains, the fiduciary duty is less a duty of care than a duty of *loyalty*.[196] The duty of loyalty is more onerous on the state in that it requires a duty to act in the best interests of the beneficiary, which demands more than just non-interference.[197]

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[190] Purkey, *supra* note 25 at 705 (emphasis added).
[191] Chief Justice Robert French AC, "Ethics and Public Office" (Sir Zelman Cohen Memorial Oration delivered at the Monash University, Melbourne, Australia, 10 September 2015) at 8.
[192] *Mabo No*. 2, *supra* note 151.
[193] *Ibid*; French, *supra* note 191 at 8.
[194] *Ibid*.
[195] *Mabo v Queensland (1998) (No 1)* 166 CLR 186; French, *supra* note 191 at 9.
[196] Fox-Decent, *supra* note 189 at 367.
[197] *Ibid* at 267.

The political realities of the nation state leads to the conclusion that such theoretical arguments, although important contributions, are unlikely to inspire a paradigm shift from the Australian Government with regards to its legal responsibility for the protection of asylum seekers. That is not to point to a failure of the theories or to diminish their value. However, to assume Australia would accept this characterisation of sovereign power would be ignorant of the *realpolitik* of modern Australian politics and culture. The theoretical argument does, however, illustrate the notion that sovereignty and the observation of international protection obligations, consistent with their teleological interpretation, are not mutually exclusive. Exposing the fallibility of hurdles that are erected to explain Australia's refusal to accept responsibility for the RPCs is a significant step towards achieving effective refugee protection. However, it falls short of addressing what has become a common theme in Australia's regional processing regime: an absence of enforcement of legal principles. The reconceptualisation of the state-refugee relationship under the fiduciary theory has set the foundation for Chapter 3, which will build upon the legal relationship between the state and the refugee arising out of tort law.

CHAPTER 3 - Human rights or civil wrongs? Rethinking enforceable rights protection in Australia

Introduction

I have argued that the pattern of harm towards detainees revealed at both the Nauru and Manus Island Regional Processing Centres exposes systemic failures of the Australian Government to discharge its duty of care owed to these detained asylum seekers.[198] If these breaches had occurred to the same extent on Australian soil, there would most likely be a suite of legal actions made against the Government.[199] Instead, the RPCs have continued to operate in the shadow of increasing reports of detainee abuse and in an environment of diminishing public scrutiny and increased public diffidence. The mere fact that the RPCs exist outside Australian territory should not present a barrier to demonstrating the Australian Government's liability for negligence. In fact, given the severity and frequency of incidents that occur at the RPCs, it is imperative that the Government be held to account for its role in immigration detention. In this Chapter, I argue that the Australian Government's responsibility can be attributed by way of alleged breaches of its non-delegable duty of care to immigration detainees. In this way, the circumvention of international obligations by multiple layers of sub-contracting of liability does not have the effect of absolving the Australian Government from liability. On the contrary, I will demonstrate that non-delegable duties (under common law) apply irrespective of the network of actors engaged by the Government.

The Federal Court of Australia has determined that the Commonwealth owes a non-delegable duty of care to immigration detainees. However, this principle, set out in *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs and Another* (*S v DIMIA*),[200] has not been considered by the High Court of Australia. The question therefore remains open (under Australian law) as to whether a non-delegable duty arises in respect of the Commonwealth and immigration detainees at RPCs.

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[198] Max Costello & Paddy McCorry, *Submission 26,* Select Committee ('the Committee') on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015) at 5.
[199] Australian Lawyers' Alliance, *Submission 14*, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015) at 6.
[200] *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] FCA 549 at [199] (Finn J) [*S v DIMIA*].

The discussion in Chapter 1 centred upon the reality of the distinct lack of enforcement mechanisms which could operate to hold the Australian Government responsible for the consequences of extraterritorial migration control. The theoretical discussion set out in Chapter 2 revealed the benefit of redefining the relationship between the state and the refugee as one characterised by a heightened duty of care and the relative merits of different theories of sovereignty and state control which, operating in tandem with the concept of the state as fiduciary, reveal the legal obligations that states might have towards immigration detainees. However, the prospect of the state acknowledging its fiduciary obligations on the bases of the theoretical positions presented here, are unlikely.[201] By comparison however, characterising the relationship between state and asylum seeker as one which necessitates obligations under a non-delegable duty of care affords rights to non-citizens regardless of the state's international law obligations, and does not require the state to accept a novel theoretical argument.[202] The appeal of this approach is that the notion of duty of care circumvents the apparent hostility of the Government towards externally imposed – albeit voluntarily accepted – obligations under international law. Therefore, the threat-to-sovereignty argument advanced by the state in defence of strict immigration policies cannot be applied where legal obligations arise out of the assumption of a common law duty by the state.

I will contend in this Chapter that remedies accorded by a breach of duty of care represent one of the remaining avenues for legal protection in which to mitigate the harm suffered by asylum seekers in immigration detention. The consequences of Australian courts rejecting the non-delegable duty of care in this scenario is significant, given the apparent enforcement gap in international law, and the fact that asylum seekers are effectively precluded from pursuing most other domestic legal mechanisms due to their offshore status and Australia's position that the Nauruan and PNG legal systems apply to any RPC 'incidents' that occur on their territories. Accordingly, Australian courts have an opportunity to inject substantial legal accountability into the regional processing regime. If the common law avenue is unsuccessful in protecting the civil rights of irregular migrants in this way, Agamben's thesis that the refugee is abandoned by the law and cast outside its protection becomes more realistic.

[201] *Ibid* at [714].
[202] Purkey, *supra* note 25 at 695.

Human rights protection in Australia: a look to the common law

Australia is unique amongst common law nations in that it does not have a statutory or a constitutional Bill of Rights.[203] The apparent scarcity of express rights protection language in statute has led to a common law response from courts in the form of *de facto* human rights protection through principles of the rule of law and statutory interpretation.[204] This inference of human rights through the common law is, from the perspective of human rights proponents, a necessary element of judicial creativity operating within an underdeveloped human rights system. Common law rights have been implied or discovered in a range of different administrative and criminal law principles concerning procedural fairness,[205] the principle of legality and the principle of non-retrospectivity. For example, at common law, there is a presumption against the interpretation of legislation limiting fundamental rights, unless there is express, unambiguous language in the statute to the contrary.[206] Further, in *Mabo No. 2*, the High Court interpreted legislation against the extinguishment of native title, upholding the land and water rights of Indigenous Australians.[207]

In *Minister for Immigration and Citizenship v Haneef*,[208] Dr Haneef, an Indian citizen, had been arrested and had his visa cancelled by the Australian Minister for Immigration and Citizenship based on his failure to pass the requisite 'character test' under the *Migration Act* because of his 'association' with known criminals.[209] The Federal Court held that Dr Haneef had specific rights pursuant to his visa, including the right to work and right to be at liberty in Australia.[210] Accordingly, the court preferred a narrow interpretation of 'association' in section 501 of the *Migration Act* and held that the Minister had erroneously applied the character test.[211] This

[203] The Australian Human Rights Commission, "Common law rights, human rights scrutiny and the rule of law" (24 October 2013) online: the Australian Human Rights Commission, <https://www.humanrights.gov.au/common-law-rights-human-rights-scrutiny-and-rule-law>.
[204] *Ibid*.
[205] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597. Under the Bhardwaj principle, decision-makers may lawfully revisit decisions that can properly be considered as wholly invalid without a court order subject to the proviso that the decision must have involved a "jurisdictional error".
[206] *Coco, supra* note 103 at 437; See also: Hon J Spigelman AC, "Principle of Legality and the Clear Statement Principle" (2005) 79 Aust L.J. 769.
[207] *Mabo No. 2*, *supra* note 151.
[208] *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203 [*Haneef*].
[209] *Migration Act, supra* note 5 at s 501(3).
[210] *S v DIMIA*, *supra* note 200 at 110.
[211] Relevantly, section 501(6) of the *Migration Act* provides that a person's visa may be arbitrarily cancelled by act of the Minister if: "the Minister reasonably suspects: (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and (ii) that the group, organisation or person has been or is involved in criminal conduct".

decision was based on the common law principle that legislative provisions should not be construed to encroach upon fundamental rights unless an express intention exists to the contrary (this is also known as the principle of legality, although the Court's decision put a further gloss on the principle as it had been applied previously in *Migration Act* decisions).[212]

Although these cases turned on the application of the well-established principle of statutory interpretation in *Coco v The Queen* (*Coco*) rather than a breach of duty of care,[213] they indicate a willingness of the judiciary to employ common law principles in a way which is consistent with human rights, where these rights are not expressly excluded from the intent of the provision by plain words. Accordingly, protections of this kind have been dubbed a 'common law Bill of Rights'.[214] Procedural fairness has also provided *de facto* rights protection in previous cases concerning asylum seekers in Australia.[215]

However, the urgency of determining liability based on the Government's duty of care is now demonstrated by the persistent foreclosure of alternate administrative and judicial remedies. These remedies, previously available to asylum seekers, have been restricted by Parliament extinguishing 'common law rights' by use of express language in statute and to the averred territorial limitations of Australian law under the current migration policy of offshore processing.[216] Further, the Government has been mindful to use express language in restricting the rights of irregular migrants so as to circumvent protections such as those afforded by the principle in *Coco*.

Tort law, and more specifically, a breach of a duty of care, is more than a cause of action in the event that a duty is breached, it also represents a declaration of community standards about conduct and can be a bellwether for community beliefs about unacceptable and acceptable treatment.[217] I contend that the conditions of detention at the RPCs and the treatment of asylum

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[212] Human Rights and Equal Opportunity Commission, "Human Rights Law Bulletin Volume 22" (March 2008) online: Australian Human Rights Commission <https://www.humanrights.gov.au/human-rights-law-bulletin-volume-22>.
[213] *Coco, supra* note 103.
[214] For example, see: Dan Meagher, "the Common Law Principle of Legality in the age of Rights" (2010) 35 MULR 449 – 478.
[215] *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41; *Cf*: *CPCF v Minister for Immigration and Border Protection & Anor* [2015] HCA 1.
[216] Chief Justice Robert French AC, "The Common Law and Protection of Human Rights" (Anglo Australasian Lawyers Society delivered at Sydney, Australia, 4 September 2009) at 4.
[217] I Malkin, "Tort Law's Role in Preventing Prisoners' Exposure to HIV Infection while in Her Majesty's Custody" (1995) 20 MULR 423 at 436.

seekers in Australia's regional processing regime, may be held in contravention of community standards. If a non-delegable duty of care is established in relation to this population, and a breach is found on behalf of the Commonwealth, the regime will be mandated to correct itself in line with community standards by ensuring the requisite standard of care is provided in immigration detention.[218] Tort law therefore might hold the power to instrumentalise substantial policy change in Australia's offshore detention regime by regulating the relationship between the Government and asylum seekers at RPCs.

Establishing the Commonwealth's non-delegable duty of care to immigration detainees

The origin of the duty of care owed to immigration detainees stems from several sources. First, the Commonwealth clearly owes a duty of care to asylum seekers at onshore detention centres by reason of its contractual agreements as well as its common law and statutory obligations.[219] However, this concept of duty of care differs with respect to asylum seekers detained at RPCs. This is because, as the law currently stands, it is unlikely that the Government's statutory duty of care requirements under federal work health and safety laws can be enforced extraterritorially.

The terms of reference of the Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru (the Nauru Inquiry)[220] specifically required the investigation of Australia's duty of care obligations with respect to asylum seekers detained at the Nauru RPC. Relevantly, the Committee received numerous submissions on the issue of the Government's failure to comply with its duty of care obligations. Several submissions discussed the Government's duty of care which may arise out of its obligations under the *Work Health and Safety Act* (WHS Act).[221] The WHS Act, which defines duty of care obligations with respect to health and safety standards, applies to the Commonwealth insofar as it conducts business and undertakings. A breach of the duty provisions constitutes an offence under the Act.[222]

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[218] Anita Mackay, "Harm suffered by children in immigration detention: Can tort law provide redress?" (2006) 14 Tort L Rev 16 at 22.
[219] Law Council of Australia, *Submission 57*, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015) at 4.
[220] Austl., *supra* note 34 at 1.
[221] *Work Health and Safety Act 2011* (Cth) [WHS Act].
[222] *Work Health and Safety Act 2011* (Cth) - *Explanatory memorandum,* Austl., Commonwealth, House of Representatives, 2 December 2010 at 1.

The statutory obligations of the Commonwealth under the WHS Act are extended not only to employees, but also the 'health and safety of other persons' must not be put at risk in the conduct of work carried out as part of the business or undertaking.[223] Several submissions to the Nauru Inquiry made the argument that immigration detainees constituted 'other persons' for the purposes of the Act, and therefore the Commonwealth owed a duty to protect their health and safety.[224] However, although the Commonwealth owes a statutory duty under the WHS Act to protect the health and safety of asylum seekers in RPCs, it does not commit an offence if it breaches this duty. The Commonwealth's statutory obligations are therefore unenforceable insofar as they apply to RPCs as a 'workplace'.[225]

The value of the 'special responsibility' to the state-detainee relationship

A non-delegable duty of care imposes a personal duty to ensure reasonable care is taken of the class of people to whom the duty is owed.[226] The duty is said to be non-delegable because a person who engages others to carry out work will be liable for the negligence of that person, irrespective of the care taken in choosing them to undertake the work.[227] The performance of the duty is capable of being delegated, however the person whom owes the duty is held responsible for any action or conduct by those engaged to carry out the duty.[228] In the case of Australia's immigration detention, this obligation translates to, at a minimum, a duty on the Australian Government to ensure that reasonable care is taken of immigration detainees while in detention. "This necessitates that the Commonwealth ensures that a level of medical care is made available which is reasonably designed to meet [immigration detainees'] health care needs, including psychiatric care."[229] Where the Government contracts with various actors to deliver the necessary care, it is obliged to ensure the requisite care is indeed delivered, and done so with reasonable skill.

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[223] WHS Act, *supra* note 221 at s 19(2); See also s 19(3)(f) where it refers to "to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking"
[224] Costello & McCorry, *supra* note 198 at 11; Australian Lawyer's Alliance, *supra* note 199 at 39.
[225] Max Costello & Paddy McCorry, *Supplementary Submission 26.1,* Select Committee ('the Committee') on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015) at 1.
[226] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686 [*Kondis*].
[227] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 32 (Mason J); *Burnie Port Authority*, *supra* note 173 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[228] *New South Wales v Lepore* (2003) 212 CLR 511, para 145 (McHugh J) [*Lepore*].
[229] *S v DIMIA, supra* note 200 at [218], [226], [263].

A defendant who is under a non-delegable duty is liable for the conduct of sub-contractors and employees by virtue of an express or implied assignment to perform their duty owed. This is the case regardless of whether the duty is one which is held by a state or a company where performance can only be undertaken by employing natural persons.[230] In the context of the Government's regional processing regime, the deliberate choice to create a system of mandatory detention of asylum seekers in third country territory necessarily involves assigning the duty to sub-contractors and officials. The appeal of this 'special responsibility' (to representatives of asylum seekers) to the precarious situation of asylum seekers at RPCs is obvious, considering the multitude of sub-contractors engaged, which would normally prohibit a successful claim in vicarious liability.

Vicarious liability would be difficult to establish on the part of the Government because of the complex outsourcing structure of the service provision at the RPCs. The High Court has stated that where vicarious liability is available, it is not necessary to determine the existence of a non-delegable duty of care.[231] There are key distinctions between vicarious liability and non-delegable duties which illustrate the suitability of the latter in attaching liability to the Commonwealth for harm suffered by immigration detainees. First, vicarious liability imposes liability on an employer when an employee under his or her control commits a tort. The employer is thereby responsible for the negligence of the employee or contractor. A breach of a non-delegable duty, on the other hand, amounts to liability for the *employer's* failure to ensure her own duty is discharged.[232] The duty arises not out of the inherent control over the tortfeasor, but from the 'special dependence or vulnerability' of the person to whom the duty is owed.[233]

Detention centre employees may be held liable in tort by reason of a breach of their duty of care to detainees.[234] Individual actions could be brought against employees at the RPCs, or the service provider companies as their employers, however, the value of attributing liability to the Commonwealth in this way is two-fold. Firstly, recognition of a non-delegable duty could expedite institutional change in RPCs. The Commonwealth, being found liable in negligence, would be wise to address the institutional culture, insofar as it contributed to a breach of duty, in order to avoid future litigation. Secondly, it is logical to target the Commonwealth as the

[230] *Lepore, supra* note 228 at [146] (McHugh J).
[231] *Ibid* at [294] – [295] (Kirby J).
[232] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, at 330 (Brennan CJ).
[233] *Burnie Port Authority, supra* note 173 at 551 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[234] *Behrooz, supra* note 178 at [21] (Gleeson CJ).

architect of the RPCs (and given the 'deep pockets' of the Crown). Individual actions against select employees would have a piecemeal effect on individual liability, rather than addressing the fundamental failures inherent in the system: inadequate standards of care. Imposing a non-delegable duty of care on the Commonwealth is also an effective way of addressing the systemic failures in offshore detention centres which continue to cause widespread harm.[235]

Despite a Federal Court decision accepting the Government's non-delegable duty to ensure reasonable care of immigration detainees at an onshore detention centre,[236] the High Court has yet to decide on the matter. The Australian Government concedes it owes a non-delegable duty to ensure reasonable care of immigration detainees.[237] Indeed, its own *Immigration Detention Standards*, which act as guiding principles for the provision of detention and the standard of care to be provided, state that: "ultimate responsibility of the detainees remains with [the Department] at all times".[238] In addition, the Department's *Detention Services Manual* clearly states that the Department owes immigration detainees a non-delegable duty of care, citing the need for the "Department to ensure that reasonable care [of detainees] is taken".[239] Notwithstanding this concession, in response to questions posed by a recent Parliamentary inquiry,[240] the Government appeared to question the existence and the scope of its duty of care applied extraterritorially when it replied: "[the Commonwealth's duty of care] is a complex question involving consideration of foreign laws and the roles played by a range of parties".[241]

I contend that the proper construction of the duty, if established, is that it operates *irrespective* of the existence of other actors: disavowing the Australian Government's definition of the complexity of legal structures that in turn scope the duty. The Government's position statement illustrates how a complex structure of outsourcing services at the RPCs can be used to legal advantage. It also coincides with Government statements that any conduct or harm caused to

[235] William Maley, *Submission 10,* Select Committee ('the Committee') on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015) at 1.2.
[236] *S v DIMIA*, *supra* note 200 at [195]-[203], [207]-[213].
[237] *Ibid*.; *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* (Cth)
[238] Austl., Commonwealth, Department of Immigration and Multicultural Affairs, *Immigration Detention Standards*, 2002 at 151.
[239] Austl., Commonwealth, Department of Immigration and Border Protection, *Detention Services Manual* (2012) at Chapter 1.
[240] Austl., *supra* note 34 at 144.
[241] Department of Immigration and Border Protection, *Answers to questions taken on notice at a public hearing on 11 July 2014* at 3, Austl, Commonwealth, Legal and Constitutional Affairs Reference Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014).

asylum seekers at RPCs is the responsibility and under the authority of the host state, rather than Australia.

As it remains open to the High Court to make a pronouncement on the existence of the Commonwealth's duty in the present context, it is necessary to discuss the case law which would strengthen a plaintiff's case that a non-delegable duty extends to asylum seekers held in detention at RPCs. This discussion is particularly important given that, in recognising the duty, the court would be required to identify a new situation and class of plaintiff to whom the duty is owed. There would be likely to be reservations from the judiciary that categorising the duty as non-delegable would amount to indeterminate liability to an infinite class of people. However, I contend that there is sufficient scope within applicable precedent to delimit the application of the duty to a restricted class. In fact, the guiding case law provides a convincing argument in favour of establishing a duty in such circumstances.

Non-delegable duties and the courts

Australian courts have a fractious relationship with the principle of non-delegable duties. The duty has been labelled as 'a disguised form of vicarious liability'[242] and it has been stigmatised as a 'logical fraud' of tort law.[243] There is considerable disagreement as to the application and scope of non-delegable duties of care.[244] In *New South Wales v Lepore*[245] (*Lepore*), Gleeson CJ remarked that: "[t]he ambit of duties that are regarded as non-delegable has never been defined, and the extent of potential tort liability involved is uncertain."[246] It is this uncertainty and absence of a strict definition that would permit a court to determine the Commonwealth owes a non-delegable duty of care to asylum seekers in immigration detention. This principle would be read with the extensive case law that supports the existence of such a duty in this 'new' situation. One could then reason that, not merely from an ethical and moral standpoint but from the sound application of existing law, courts should find in favour of the existence of the duty. This argument is bolstered by the fact that, at present, a cause of action in negligence represents the only material chance of a remedy for harm suffered at the hands of the Australian Government's immigration detention policies.

[242] John G Fleming et al, *Fleming's the law of torts*, 10th ed (Pyrmont: Thomson Reuters, 2011) at 464.
[243] *Ibid*.
[244] John Murphy, "The liability bases for common law non-delegable duties – a reply to Christian Witting" (2007) 30 UNSW Law Journal 86 at 86.
[245] *Lepore, supra* note 228.
[246] *Ibid* at 523.

There are several limited categories of relationships in which a non-delegable duty of care has been established, including school authority and pupil,[247] employer and employee[248] and hospital and patient.[249] The liability of a hospital to a patient arises out of an inherent obligation to use reasonable care in treatment, and to ensure the requisite care is taken when an employee is invariably engaged to carry out this duty on the hospital's behalf.[250] Similarly, a school authority has a duty to ensure reasonable care is taken of its pupils. This special responsibility is based on the vulnerability of children and their fundamental need for safety and supervision, which the school authority accepts by implication of admission to the school.[251]

The High Court in *Lepore* rejected the extension of the state's non-delegable duty to cover intentional harm in situations where a teacher sexually abused a pupil.[252] The decision reflects the hesitation of Australian courts towards the duty and their reluctance in expanding the categories which fall under its ambit. The dissenting judgement from McHugh J took a different approach to the extension of the established duty. In finding that the state of New South Wales was liable for the intentional harm of the pupil by the teacher, His Honour favoured a broad interpretation of the nature and scope of the non-delegable duty. McHugh J highlighted the well-established doctrine that a school authority has a non-delegable duty to ensure reasonable care is taken of its pupils. That translates to the state ensuring this duty is indeed carried out.[253] The state's duty to protect pupils is clearly breached if a teacher intentionally harms a pupil. To find otherwise simply because of the criminal, intentional wrongdoing of another, as the majority did, would surely be contrary to the purpose of the non-delegable duty.

McHugh J provides a compelling argument in favour of adopting a broad interpretation of the nature and scope of the duty. Assuming for a moment that a court would recognise the non-delegable nature of the duty owed by the Government to immigration detainees, a broad interpretation of the scope of the duty would be the preferred construction to capture intentional wrongdoing such as the sexual abuse of immigration detainees at Nauru RPC. Whether the conduct of an immigration detention employee was sufficiently serious to be of a criminal,

[247] *Commonwealth v Introvigne* (1982) 150 CLR 258; *Kondis*, *supra* note 226 at 685.
[248] *Ibid*.
[249] *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542; *Ibid* at 685.
[250] Kondis, *supra* note 226 at 684.
[251] *Ibid*.
[252] *Lepore, supra* note 228.
[253] *Ibid* at [136] (McHugh J).

intentional nature should not preclude liability of the Commonwealth. Rather, the non-delegable duty of the Commonwealth is to take reasonable care to ensure the safety of asylum seekers at the RPCs.

By the same token, if the court characterises the state's responsibility to immigration detainees as 'special' in nature sufficient to warrant this duty, the sexual abuse of children or other detainees by staff at the RPCs would constitute a clear breach of the Government's duty. The Government therefore could not escape liability for the consequences of the intentional conduct of those it has engaged to run the RPCs.[254]

In *Burnie Port Authority v General Jones Pty Ltd*, the court cited the principle from *Kondis v State Transport Authority* where it was found that a common element exists in most cases that gives rise to a non-delegable duty. The element which enlivens the special responsibility or duty of care is that:

> "the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person …[and] assume[s] a particular responsibility for his safety in circumstances where the person affected might reasonably expect that due care will be exercised".[255]

This determinative factor which gives rise to a non-delegable duty has been labelled the 'central element of control'.[256]

The state-immigration detainee relationship possesses the essential hallmarks that are present in the established categories of this duty of care of a special kind. In fact, it is difficult to imagine a clearer example of the requisite element of control to that exercised by the Commonwealth over asylum seekers in immigration detention. Asylum seekers held at the RPCs are completely dependent on the Australian Government in the provision of all essential services including education, healthcare and security. Their well-being and health is at the complete discretion of the Australian Government as the architect of the policy that placed and maintains them in immigration detention at RPCs. By creating mandatory detention of unauthorised maritime arrivals, the Australian Government made a conscious decision about the movement and placement of detainees and, by extension, assumed the duty to provide for their care and safety

[254] *Ibid* at [161] (McHugh J).
[255] *Kondis, supra* note 226 at 687 (Mason J)
[256] *Ibid* at 551 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

under circumstances (incarceration) where they would reasonably expect that due care would be taken. Further, the vulnerable status of child asylum seekers is tantamount to that of pupils, in that their inexperience and vulnerability demands supervision and protection from the state. Given the heightened healthcare needs of some asylum seekers due to trauma experienced in their country of origin, the special responsibility of the hospital to the patient is analogous to that of the state and immigration detainees.

Making the choice of mandatory detention: the Commonwealth's assumption of duty

In *S v DIMIA,* the case turned on the adequacy of health care, especially psychiatric care, provided to immigration detainees with known mental health issues. The case examined the extent of Commonwealth liability in these situations where services are outsourced to private corporations.[257] Remarkably, the Commonwealth conceded it owed a non-delegable duty to ensure reasonable care was taken of immigration detainees. Finn J agreed the Commonwealth had rightly acknowledged their duty and discussed the content and scope of the duty in reference to the analogous relationships of hospital and patient and gaoler and prisoner.[258] His Honour drew comparisons of the characteristics of the hospital-patient relationship and the Commonwealth's assumed responsibility for the healthcare of immigration detainees, particularly those with known mental illnesses.[259] Finn J specifically highlighted the fact that the Government was cognisant that detainees in indefinite detention were particularly vulnerable to mental illnesses. This knowledge emphasised the Government's assumption of responsibility for the healthcare of immigration detainees at the detention centre.

As to the relationship of gaoler-prisoner, Finn J highlighted the similarity with prisoners in terms of the special dependence of detainees, including their lack of freedom and inability to provide for their own needs, particularly given their precarious mental health status.[260] I propose that immigration detainees are, in fact, more vulnerable than prisoners. This conclusion (if accepted) would serve to reinforce the 'special responsibility' of the State to immigration detainees. I draw this conclusion on the basis that, unlike prisoners, asylum seekers have not committed any crime to mandate their detention. Rather, their detention is predicated on a breach of administrative law which sanctions their mode of arrival and their status as unauthorised maritime arrivals.

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[257] Matthew Groves, "Outsourcing and non-delegable duties" (2005) 16 Public Law Review 265 at 265.
[258] *S v DIMIA, supra* note 200 at 215.
[259] *Ibid* at 261.
[260] *Ibid* at 216.

This distinction between prisoners and immigration detainees evokes Arendt's analysis of the refugee held in contrast to the non-citizen who commits a crime. Arendt wrote of the absurdity that a refugee, having committed no crime, is subject to detention and deportation without trial or protection of her rights. However, if the same individual commits a crime, she is granted access to the law and has the right to complain about the nature of her detention.[261] The refugee becomes a more 'respectable person' under the protection of the law and is treated equally to citizens if she commits a crime, than if she had remained a mere refugee.[262] Arendt's analysis illustrates the heightened vulnerability and dependence of irregular migrants compared to prisoners, which, for the purposes of establishing the non-delegable duty of care, reinforces the special nature of the responsibility.

Despite the apparent suitability of the state-detainee relationship as one which would give rise to a non-delegable duty, it would require convincing a court that establishing this category of relationship would not result in a floodgates scenario, where the Commonwealth has unlimited liability for any actions done to an unlimited class of persons. Indeed, Australian courts have been reluctant to categorise some relationships as having a 'special dependence' as it involves departing from a duty to take reasonable care and instead requires a duty to *ensure* that reasonable care is taken.[263]Although the relationship may easily be compared to the vulnerability and dependence of other established categories which warrant the duty, the High Court has declared that not every association bearing the symbols of this special vulnerability and dependence will necessarily constitute a non-delegable duty of care.[264]

Arguments against establishing the non-delegable duty of care in the present case are likely to highlight the above arguments. For example, the relationship of gaoler and prisoner does not automatically demand a non-delegable duty on behalf of a prison authority. However, if vulnerability and dependence are the harbingers of this more stringent duty of care, then by reason of their lack of citizenship status and foreclosure of most other legal remedies, immigration detainees are particularly susceptible to the consequences of coercive state power. Indeed, these factors in themselves should convince a court to determine the non-delegable duty owed by the Commonwealth to asylum seekers held in immigration detention.

[261] Arendt, *supra* note 111 at 286.
[262] *Ibid* at 287.
[263] *Kondis*, *supra* note 226 at 235.
[264] *Burnie Port Authority, supra* note 173 at 550-551.

In *S v DIMIA,* the court underscored the special dependence of immigration detainees, fashioning the content and scope of the duty of care as one which must accommodate the heightened vulnerability of detainees with mental illnesses.[265] Further, in reference to the standard of psychiatric care provided at Baxter detention centre, Finn J highlighted the remoteness of the centre and its effect on the standard of care provided. His Honour declared in *obiter* that:

> "Having made its choice of location, the Commonwealth, not the detainees, should bear the consequences of it insofar as that choice has affected or compromised the medical services that could be made available to meet the known needs of detainees."[266]

Finn J's comment goes to the very heart of the question of liability for the consequences of inadequate healthcare and poor conditions which expose immigration detainees to harm at RPCs. The Commonwealth invests considerable public funds and expends significant resources to maintain regional processing and detention as a deterrent to irregular immigration. Owing to the inevitable limitations as a result of the remoteness and position of the RPCs in developing countries, it is the Commonwealth who should bear responsibility for the consequences of its policies, not detainees.

Despite previous decisions from the High Court of Australia upholding the legality under the *Migration Act* of long-term and indefinite detention,[267] as well as the conditions of detention,[268] Finn J found the Commonwealth had breached its duty of care to provide reasonable physical and mental health care to the plaintiffs in immigration detention. The decision in *S v DIMIA* reflects the ability of the common law to provide redress to asylum seekers despite the legality of mandatory detention. The authority to place asylum seekers in immigration detention does not absolve actors of their individual criminal and civil responsibility in the event of mistreatment of detainees.[269]

There are fundamental compromises to detainee health and safety by virtue of their location in developing countries where there is known animosity towards detainees and limited health care

[265] *S v DIMIA, supra* note 200 at 217.
[266] *Ibid* at 296.
[267] *Al-Kateb v Godwin* (2004) 208 ALR 124.
[268] *Behrooz*, *supra* note 178 at 278 (Gleeson CJ), 283-284 (McHugh, Gummow and Heydon JJ).
[269] Wilsher, *supra* note 33 at 302; Groves, *supra* note 257 at 268.

and service provision below Australian standards.[270] I argue that the consequences of these inevitable compromises places a duty on the Australian Government in the same way that Finn J found the consequences of remote detention in Australia were born by the Commonwealth in *S v DIMIA*. Accepting at first instance the Commonwealth's knowledge of the limitations and health risks to detainees at RPCs,[271] the Government was, and continues to be, aware of the failures of the judicial systems in RPC territories, especially in the case of Nauru. The Australian Government's capacity building of Nauru police signifies an implicit understanding of the limitations of local authorities. Further, as a result of the findings in the Moss Review, the Australian Federal Police was deployed to assist local authorities in Nauru regarding its sexual assault investigation processes and other like crimes.[272] In addition, the Nauru Inquiry heard evidence that the Nauruan police force is ill-equipped to deal with criminal investigations.[273] The ongoing harm suffered by immigration detainees is, therefore, a reasonably foreseeable consequence of immigration detention at the RPCs.[274]

Establishing the central element of control: Australia's role at RPCs

Assuming the non-delegable duty of care was established, the necessary first step in determining liability of the Commonwealth for alleged breaches is to define the scope and content of the duty.[275] A number of submissions to Parliamentary inquiries, as well as independent reports, have detailed numerous examples of the high degree of control exercised by the Australian Government over the RPCs.[276] This high degree of control is directly relevant to the application of the Commonwealth's duty of care owed to asylum seekers at the RPCs as it provides a basis for establishing the scope of the duty. Simply put, the more control exercised over the RPCs by the Commonwealth, the more likely it will be that a court will find a non-delegable duty of care to exist. Once the duty is established, strict liability is imposed on the Commonwealth for any harm suffered as a result of a failure to carry out the duty.[277]

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[270] Austl., *supra* note 18 at 40; Austl., *supra* note 34 at 80-84.
[271] The Commonwealth has knowledge of the limitations and compromises to the standard of care in immigration detention at the RPCs by virtue of the numerous reports detailing the conditions. In addition, the control exercised by the Commonwealth over the RPCs suggests the Department, and by association the Commonwealth, is aware of the conditions of detention which amount to a breach of the duty of care.
[272] Austl., *supra* note 34 at 20.
[273] *Ibid* at 19.
[274] Moss, *supra* note 19 at 145.
[275] *Lepore, supra* note 228 at 213 (McHugh J).
[276] See generally: Moss, *supra* note 19; Austl., *supra* note 18; Austl., *supra* note 34; Australian Human Rights Commission, *supra* note 47.
[277] Fleming, *supra* note 242 at 464.

In respect of the Government's control of the Nauru RPC, the Moss Review heard evidence from Nauruan operations managers, responsible for creating a link between the Centre and the Nauruan government, that they received limited information about the daily running of the Centre from the Department.[278] Testimony suggested that the staff, instead of liaising with Nauru operations managers, reported information on the day-to-day running of the Centre directly to the Department.

The memoranda of understanding (MOU) as between the Commonwealth and PNG and Nauruan governments detail the guiding principles to which the parties will be held to in the execution of the agreements. The MOU are, however, unenforceable in law. Nonetheless, they do indicate an express acceptance of the Government to be bound by the Australian Constitution and relevant domestic laws in the conduct of all activities concerning the RPCs.[279] Submissions to the Nauru Inquiry argued that the memoranda imposed moral obligations upon the parties to meet the provisions in good faith.[280] However such moral obligations, even if they were to be accepted, suffer similar limitations of unenforceability.

Although the agreements do not impose legal obligations on the parties, they evidence the bases of Australia's high degree of control over the offshore processing regime. The agreements are largely identical, for example, both agreements establish that Australia will bear all costs that arise out of the performance of the MOU.[281] Similarly, both Nauru and PNG must accept 'Transferees' as sent by Australia,[282] which is at the discretion of Australian law.[283] As the Law Council of Australia emphasised in its submission to the Nauru Inquiry, the Australian Government dictates who is transferred to the RPCs and under what circumstances.[284] The Government established the RPCs, entered into MOU regarding their running and organisation, pays for the construction and the running of the RPCs and directly engages sub-contractors to carry out service provision.[285] It is clear that, but for the support of, and ongoing control by, the Australian Government, the RPCs would not have been established, nor would they continue to exist.

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[278] Moss, *supra* note 19 at 73.
[279] Nauru MOU, *supra* note 13 at 3; PNG MOU, *supra* note 13 at 3.
[280] Austl., *supra* note 34 at 18.
[281] MOU PNG, *supra* note 13 at 3; Nauru MOU, *supra* note 13 at 3.
[282] *Ibid* at 4.
[283] *Ibid*.
[284] Law Council of Australia, *supra* note 219 at 9.
[285] *Ibid*.

I contend that the fact that any potential breach of duty occurred outside Australian territory does not absolve the Commonwealth of its obligations, as the 'central element of control' is present.[286] However, the offshore presence of the asylum seeker would mean that the law of the respective third country would apply to negligence claims.[287] Both Nauruan and Papua New Guinean law incorporate principles of negligence from the common law and the law applied by the courts is unlikely to differ substantially from the principles that would be applied in an Australian jurisdiction.[288] In any event, a plaintiff could request that an Australian court has jurisdiction to hear such a case, and this request should be granted, unless it can be shown that Australia was a 'clearly inappropriate' forum for such a claim.[289] Due to the nature of the claims and the level of involvement of the Commonwealth in the running of the RPCs, it is reasonable to assume that Australian courts would determine Australia as an appropriate forum in which to hear the claims.[290] The challenge for a plaintiff would be convincing a court that not only are the essential characteristics of the 'special dependence' present, but that they import the necessary duty.[291]

The unreasonable failure to take reasonable care

In establishing a breach of a non-delegable duty on the part of the Commonwealth, an asylum seeker detained at one of the RPCs would not be required to identify a specific official or RPC employee as the person responsible for failing to take reasonable care for their safety. Rather, the plaintiff would merely need to demonstrate the existence of the situation or conduct which precipitated the harm suffered, and that it would have been reasonable for the Government to

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[286] Castan Centre for Human Rights Law, *Submission 18*, Austl, Commonwealth, Select Committee on the recent allegations relating to the conditions and circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre* at 3.

[287] Andrew and Renata Kaldor Centre for International Refugee Law, "Inquiry into the Incident at the Manus Island Detention Centre from 16 to 18 February 2014" (2 May 2014) online: UNSW Australia <http://www.kaldorcentre.unsw.edu.au/resource/inquiry-incident-manus-island-detention-centre-16-18-february-2014#footnoteref13_jeho1ny> at 3.1.2; The cases of *RN v Commonwealth* [2014] VSC 289 *[RN v* Cth] and *Majid Karami Kamasaee v the Commonwealth* SCI 2014 06770 [*Kamasaee*] are currently before the Victorian Supreme Court and both statement of claims assert that the law of Papua New Guinea applies.

[288] Azadeh Dastyari, "Out of Sight Out of Right? Who Can Be Held Accountable for Detainees Harmed on Nauru?" in Babacan Alperhan & Linda Briskman (eds), *Asylum seekers: International Perspectives on Interdiction and Deterrence* (Cambridge: Cambridge Scholars Publishing, 2008) 82.

[289] *Voth v Manildra Flour Mills Pty Ltd (1990)* 171 CLR 538; *Oceanic Sun Line Special Shipping Company Inc v Fay (1988)* 165 CLR 197.

[290] Andrew and Renata Kaldor Centre for International Refugee Law, *supra* note 287. It is beyond the scope of this paper as to the conflict of laws issues inherent in determining the appropriate jurisdiction for an action of this kind. See also *supra* note 228: there are several cases which are being heard by Australian courts where the subject of the harm alleged in the claim occurred at Manus Island RPC which suggests the appropriateness of Australia as a forum to hear such cases.

[291] *Lepore, supra* note 228 at [255].

protect her from such harm.[292] As strict liability applies in these cases, if it can be shown that the duty to ensure reasonable care of the plaintiff was not discharged, the Commonwealth will be liable for the breach of its duty.[293]

Australian courts would necessarily determine the reasonableness of care provided on an individual basis. There are already some high-profile duty of care immigration cases that are before the Supreme Court of Victoria with regards to immigration detainees.[294] In the case of *RN v Commonwealth,* the Government's breach of duty is alleged on the basis of failing to provide reasonable health care to immigration detainees at Manus Island RPC. The lawyers representing asylum seekers in this class action are seeking to establish a precedent for the Government's legal obligations towards immigration detainees.[295] Previously, related civil claims have been settled out of court at great expense to the Commonwealth. Figures obtained from the Department of Finance by the Australian Lawyers Alliance show that over 22 million dollars has been paid out in compensation claims to detainees since 1999.[296] Settlement out of court, while giving financial compensation for injuries suffered, has the unfortunate effect of avoiding a formal declaration by a court of government liability under the offshore processing regime.

Evidence suggesting the failure to ensure reasonable care is taken of immigration detainees at both RPCs is widespread.[297] The following examples demonstrate just some of the evidence which could be used to assert the Government has acted negligently with respect to ensuring the reasonable care of immigration detainees at the RPCs.[298] Institutional failures in the provision of health care services at the Manus Island RPC reveal systemic neglect on behalf of the Government sufficient to establish a breach of duty.[299] The Manus Island Inquiry heard evidence that there were often protracted wait times for medical appointments at the RPCs.[300]

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[292] *Ibid* at [160] (McHugh J).
[293] *Burnie Port Authority*, *supra* note 173 at [257].
[294] *RN v Cth, supra* note 287; *Kamasaee, supra* note 287.
[295] Richard Ackland, "Want to know about immigration detention? Then sue for negligence" *Guardian Australia* (5 May 2015) online: Guardian News and Media Limited <http://www.theguardian.com/commentisfree/2015/may/05/want-to-know-about-immigration-detention-then-sue-for-negligence>.
[296] Chris Vedelago, "Government in fight over refugee injury claims" *The Sydney Morning Herald* (20 July 2014) online: Fairfax Media <http://www.smh.com.au/national/government-in-fight-over-refugee-injury-claims-20140717-zu0se>.
[297] See generally: Amnesty international, *supra* note 18; Austl., *supra* note 19; Australian Human Rights Commission, *supra* note 47; Austl., *supra* note 34.
[298] Much of this evidence is the subject of current cases before the Victorian Supreme Court see *supra* note 287.
[299] Similar failures in the standard of care provided at the Nauru RPC were revealed in the Nauru Inquiry: Austl., *supra* note 34 at 80.
[300] Austl., *supra* note 19 at 44.

Appointment request forms were required to be filled out even for the most basic of treatment, including administering paracetamol. There were complaints that asylum seekers had to submit several forms so that their request for a medical appointment was 'taken seriously'.[301] In addition, staff at the RPC alleged that their repeated requests to authorities for simple improvements in order to prevent health issues such as increased shade, additional drinking water and mental stimulation activities, were either denied or simply ignored.[302]

Majid Kamasaee, an Iranian asylum seeker who was in immigration detention at the Manus Island RPC, is the lead plaintiff in a class action against the Government currently before the Supreme Court of Victoria. Before fleeing Iran, Kamasaee suffered serious burns to his body which required constant medical attention. However, Kamasaee alleged that authorities at the RPC confiscated his medication without replacing it.[303] The Statement of Claim in the case contends that the plaintiff was provided with sunscreen instead of specialist medical cream to treat his burns, and that his case would not be prioritised as it was not life threatening.[304] The claim alleges that the plaintiff's requests for the return of his confiscated medical cream were never addressed.[305] These allegations indicate inherent failures in the structure of the provision of services and health care at the RPCs. They also suggest a widespread failure to exercise reasonable care on behalf of the Government. As a result, the plaintiff's claim is that the Government has breached its non-delegable duty to Kamasaee and that it should be found liable in negligence.

Limitations in common law protections of immigration detainees

There are limitations of a duty of care argument in the ultimate effective protection of asylum seekers. Even if the court found a non-delegable duty exists in respect of immigration detainees, and a breach was made out on the facts, it would not render their detention illegal.[306] Remedies are limited to monetary compensation for harm suffered, as the duty of care does not transcend the statutory authority of the Government to detain unauthorised maritime arrivals. This

[301] Amnesty International, *supra* note 18 at 54.
[302] *Ibid* at 52.
[303] Sarah Whyte & Natalie O'Brien, "Asylum seekers sue the government for negligence" *The Sydney Morning Herald* (20 December 2014) online: Fairfax Media <http://www.smh.com.au/federal-politics/political-news/asylum-seekers-sue-the-government-for-negligence-20141219-12az8a.html>.
[304] Majid Karami Kamasaee, 'Second amended statement of claim', submission in *Kamasaee v the Commonwealth of Australian and others,* SCI 2014 06770, 25 May 2014, 59.
[305] *Ibid*.
[306] Groves, *supra* note 257 at 268.

limitation was highlighted in the case of *SBEG v Commonwealth*,[307] where, despite expert evidence declaring that the plaintiff was at a high risk of suicide if detention was continued, the court could not compel the release of the plaintiff from detention.[308] Simply put, the duty to ensure reasonable care of immigration detainees does not substitute the state's authority under the *Migration Act* to detain unauthorised maritime arrivals, even where it is known that such detention could have an adverse effect on the physical or psychological health of the individual.[309] This stems from the hierarchy of law in Australia, where express provisions in statute trump common law principles to the extent that they conflict.

Owing to the remote location of the centres, it is uncertain whether the RPCs will ever be capable of operating in a way which ensures the Commonwealth's duty can be fully discharged.[310] The RPCs are located in developing nations where services and the standard of basic care are extremely limited. The suitability of remote detention centres within Australia has been questioned in the past, given the inevitable compromises that must be made on health care and the general standard of care provided.[311] This is partly what led to the closure of the Baxter Detention Centre in South Australia.[312] Assuming the duty is established, there would be a risk to the Commonwealth of opening the litigation 'floodgates' to a large number of personal injury claims from the RPCs as a consequence of the nature of the centres. The Commonwealth asserts it already makes positive steps to improve the facilities and the standard of care provided at the RPCs. However, personal injury claims may increase to a point where it is no longer viable to maintain the RPCs. A non-delegable duty of care may not have the effect of rendering illegal the detention of asylum seekers known to suffer from their confinement at the RPCs, but it could eventually influence the Government to close the detention centres as recognition of the state's non-delegable duty challenges the proposition that RPCs are beyond the reach of Australian law.[313]

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[307] *SBEG v Commonwealth of Australia* [2012] FCAFC 189
[308] *SBEG v Secretary, Department of Immigration and Citizenship (No 2)* [2012] FCA 569 at [36]
[309] Austl., Commonwealth, Commonwealth Ombudsman, *Ombudsman report*: *suicide and self-harm in the immigration detention network* (Report No. 02/2013) by the Commonwealth and Immigration Ombudsman (2013) at 31.
[310] At the time of writing, there was yet another incident of unrest at the Christmas Island Detention Centre, which is located within Australian territory. The litany of incidents which continue to occur indicate a widespread failure of the centres to provide for the safety and security of the detainees and as a result represent systemic failure of the Commonwealth to discharge its duties owed to immigration detainees.
[311] *S v DIMIA, supra* note 200.
[312] Ackland, *supra* note 295.
[313] The effect of legal action challenging the validity of detention at RPCs was recently seen by the Australian Government's decision to change the Nauru RPC to a 'fully open' centre. As discussed above, the policy change has been criticised as an attempt to affect the outcome of the simultaneous case before the High Court. However, it

CONCLUSION

The Australian Government consistently maintains extraterritorial migration control as a necessary policy response to irregular migration, despite the ongoing harmful environments and human rights abuses exposed at the Regional Processing Centres. In my analysis, I have revealed a protection gap in the context of Australia's regional processing regime where meaningful refugee protection is difficult to achieve. The limitations to effective refugee protection are two-fold. First, owing to Australia's lack of human rights protection in the domestic landscape, the Government can implement legislation which expressly encroaches upon fundamental rights of asylum seekers. This has translated to consistently regressive immigration policies which have greatly limited access to judicial and administrative review of migration decisions as well as restricting the courts' interpretation of legislation in a way which is consistent with fundamental rights. Second, the enforcement gap apparent at international law, together with the territorial limitations of rights protection under the *Refugee Convention,* have enabled the Australian Government to pursue extraterritorial migration control with little legal oversight. The urgency in determining an enforceable legal mechanism in which to mitigate the harm and systemic abuse which is apparent at the RPCs is demonstrated by the ongoing suffering by detainees located at Manus Island and Nauru RPCs.

In Chapter 2, I deconstructed the sovereignty/irregular migration dichotomy which is regularly offered as justification by the Australian Government for strict immigration policies. The analysis demonstrated a history of Australia's tenuous hold on territorial sovereignty, which may provide some understanding as to renewed anxieties in 'protecting' borders from the arrival of irregular migrants. Recounting previous 'threats' to Australian sovereignty undermined the fiction that challenges to the sovereignty of a nation must be resisted at all costs.

The need for an alternative theoretical construction of state power and the relationship between the state and the refugee is evident in the way the state persistently invokes the sovereign power to expel individuals as rationale for strict border control measures. Evoking Agamben's theory of the refugee as *homo sacer*, I proposed an understanding of the exclusionary practices of the state in its response to irregular migration. However, I challenged the poststructuralist account that exclusion of 'the Other' from the protection of sovereign law is a inevitable demonstration of

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indicates the positive affect legal challenges may have on the Government's policy of mandatory detention. See *supra* note 78.

sovereign power. Accordingly, poststructuralists opine that the refugee exists outside the law. However, by reason of the Government expressly excluding irregular migrants from Australian territory, the irregular migrant is brought within the control of the sovereign by 'inclusion through exclusion'. As a result, irregular migrants retain legal personality by virtue of the control exercised by the state over their movement, and as a corollary, their inalienable civil rights against the state.

By advancing Purkey's analysis of Fox-Decent's fiduciary theory, I contended that reconceptualising the state-refugee relationship as one which is grounded in a fiduciary relationship, ensures the harmonious existence of state sovereignty and effective refugee protection. This alternative theoretical approach reconciled the principle of sovereignty with the modern reality of global migration, situating the state's obligations arising out of the exercise of power, rather than externally imposed by treaties, thereby undermining the Australian Government's position.

These theoretical approaches, while important contributions, fall victim to the same limitations as international law protections – that is, they lack domestic implementation and enforcement power in Australia. However, by redefining the relationship between the state and the refugee, together with alternate conceptions of sovereign power and deconstructing the sovereignty/irregular migration dichotomy, Chapter 2 set the foundation for tort law negligence as protection for the harm suffered by asylum seekers held in detention at the RPCs.

Against the backdrop of enhanced enforcement, and the realisation of detainee's legal personality as against the state, I proposed that a cause of action in negligence against the Australian Government represents detainees' best chance of achieving accountability for harm suffered at the RPCs. The non-delegable duty to ensure reasonable care to detainees obliges the Government to be cognisant of its role in the operation and function of RPCs, including its affects on asylum seekers. The myriad incidents and institutionalised harm which occurs as a result of the Government's regional processing regime, represents systemic breaches of the Government's duty of care. Accordingly, it is likely the Australian Government will be liable in negligence.

The analysis presented throughout this thesis is limited in that it forms just one part of the wider discourse attributing responsibility for the consequences of human rights abuses and extraterritorial migration control. However, in the context of Australian domestic law, and its engagement with international law principles, the duty of care argument represents one of the last bastions of effective rights protection available to asylum seekers held in detention at the RPCs. It is my hope that Australian courts will establish a precedent entrenching the obligations of the Government under its regional processing regime. Establishing the non-delegable duty of care may provide the opportunity for change in the way in which asylum seekers are held in immigration detention, and ultimately spell the dissolution of the regime as the costs of personal injury cases may outweigh the benefits of regional processing.

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