NOT FOR EXPORT: THE FAILURE OF AUSTRALIA'S EXTRATERRITORIAL PROCESSING REGIME IN PAPUA NEW GUINEA AND THE DECISION OF THE PNG SUPREME COURT IN *NAMAH* (2016)

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I INTRODUCTION

> *Manus Island shocked me to my core. I saw sick and defeated men crammed behind fences and being denied their basic human rights, padlocked inside small areas in rooms often with no windows and being mistreated by those who were employed to care for their safety.*[1]

> *Please, we can't sleep. We are scared all the time.*
> *We have no (running) water, no safety.*
> *Please report this, we want freedom.*[2]

The so-called 'Pacific Solution' operated by successive Australian governments to deal with refugee boat arrivals has been the subject of domestic and international criticism.[3] It is, however, now an arrangement which certain other countries are looking to as a possible model to emulate.[4] The Pacific Solution has

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1 Nicole Judge, quoted in Senate Legal and Constitutional References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) 37 [3.1].

2 Detainees at Manus Island Detention Centre, quoted in 'The View inside the Manus Island Detention Centre', *SBS News* (online), 21 March 2014 <http://www.sbs.com.au/news/article/2014/03/21/view-inside-manus-island-detention-centre>.

3 This article uses the term 'Pacific Solution' to refer to Australia's extraterritorial processing and detention regime in Nauru and Papua New Guinea between the years 2001 and 2007 and again from 2012 onwards. For commentary on the Pacific Solution see Susan Kneebone, 'The Pacific Plan: The Provision of 'Effective Protection'?' (2006) 18 *International Journal of Refugee Law* 696; Tara Magner, 'A Less than 'Pacific' Solution for Asylum Seekers in Australia' (2004) 16 *International Journal of Refugee Law* 53.

4 For instance, a parliamentary delegation from Denmark was to visit Nauru to consider the adoption of similar extraterritorial detention policies in Europe: Paul Farrell, 'Danish MP Confirms Visit to Nauru Camp at Heart of Offshore Detention Outcry', *The Guardian* (online), 23 August 2016 <https://www.theguardian.com/australia-news/2016/aug/23/danish-politicians-seek-to-visit-nauru-site-at-heart-of-offshore-detention-outcry>. However, the trip was cancelled because Nauru denied visas to two Danish MPs in the group who were unsympathetic to the Australian model of offshore processing: Nicole Hasham, 'Nauru Bans Unsympathetic Danish MPs from Detention Centre Visit', *The Sydney Morning Herald* (online), 31 August 2016 <http://www.smh.com.au/federal-politics/political-news/nauru-bans-unsympathetic-danish-mps-from-detention-centre-visit-20160830-gr4y8g.html>. See also statements by European Affairs spokesperson for the Danish People's Party discussed in James Glenday, 'Denmark Urged to Adopt 'Australian Solution' and Send Asylum Seekers to Greenland', *ABC News* (online), 1 March 2016 <http://www.abc.net.au/news/2016-02-24/denmark-considers-other-solutions-to-stop-asylum-seekers/7191334>. Austrian Foreign Minister Sebastian Kurz is reported to have suggested that Australia's immigration policy should be replicated by the EU in order to deal with the current influx of refugees: see 'Austrian Foreign Minister Suggests 'Refugees Should Be Held Offshore'', *Deutsche Welle* (online), 5 June 2016 <http://www.dw.com/en/austrian-foreign-minister-suggests-refugees-should-be-held-offshore/a-19307391>.

been problematic for some time due to the nature of the agreements Australia has finalised with third countries. Australia has attempted to establish a form of 'regional processing' in the Asia-Pacific via bilateral agreements with two key developing nations in the region: Nauru and Papua New Guinea ('PNG'). However, the viability of a key component of this legal regime has been called into question by the 2016 decision of the PNG Supreme Court in *Namah v Pato* ('*Namah*').[5] The Court, in a unanimous decision of five judges, held that detention of refugees and asylum seekers in the Australian-funded centres in that country was unconstitutional under the right to liberty set out in the *PNG Constitution*.[6] The Court ordered, inter alia, that both the Australian and PNG governments 'take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees … on Manus Island'.[7]

The aftermath of this important ruling has been interesting in terms of both human rights law and Australia's international relations with PNG. Following the decision of the Court, PNG Prime Minister Peter O'Neill said that the executive would comply with the court order and would shut down the detention facility.[8] PNG authorities also informed the UN Human Rights Council that it would comply with the court ruling.[9] Australia's response was initially far different, with the government failing to endorse the PNG government's decision to close the centre. Instead, it concentrated its efforts on persuading PNG to 'work around' the Supreme Court decision.[10] The Australian and PNG governments did not confirm their intention to close the Manus Island detention facility until 17 August 2016.[11] Following the confirmation from Australia and PNG that the

5 [2016] Papua New Guinea Supreme Court 13 (Salika DCJ, Sakora, Kandakasi, Sawong and Higgins JJ). Their Honours were in general agreement as to the conclusions and reasoning in the decision, with Kandakasi and Higgins JJ writing individual reasons for judgment. Note that, like some other Pacific nations, non-citizen judges can serve on the bench of the PNG Supreme Court — see *Organic Law on the Terms and Conditions of Employment of Judges* (Papua New Guinea) s 2(c). Justice Terrence Higgins is a former Australian judge and the sixth non-citizen judge serving on the bench in PNG: see 'Justice Terence Higgins Appointed Judges of National and Supreme Courts', *PNG Facts* (online), 10 March 2015 <http://www.pngfacts.com/44/post/2015/03/justice-terence-higgins-appointed-judges-of-national-and-supreme-courts.html#ixzz47k9fu9ut>.

6 *Constitution of the Independent State of Papua New Guinea* (Papua New Guinea), came into effect 16 September 1975 ('*PNG Constitution*') s 42; *Namah* [2016] Papua New Guinea Supreme Court 13.

7 *Namah* [2016] Papua New Guinea Supreme Court 13, 28 [74].

8 Stephanie Anderson, 'Manus Island Detention Centre to Be Shut, Papua New Guinea Prime Minister Peter O'Neill Says', *ABC News* (online), 28 April 2016 <http://www.abc.net.au/news/2016-04-27/png-pm-oneill-to-shut-manus-island-detention-centre/7364414>.

9 UN Human Rights Council, 'Papua New Guinea Review — 25th Session of Universal Periodic Review', discussed in Ben Doherty, 'Papua New Guinea Tells UN It Accepts Court Decision on Manus Island Illegality', *The Guardian* (online), 7 May 2016 <http://www.theguardian.com/australia-news/2016/may/07/papua-new-guinea-tells-un-it-accepts-court-decision-on-manus-island-illegality>.

10 Minister for Immigration Peter Dutton argued that the PNG court decision is not binding on Australia and that the asylum seekers and refugees in the centre are PNG's responsibility. See Francis Keany and Louise Yaxley, 'Manus Island Detention: PNG Responsible for Asylum Seekers, Peter Dutton Says', *ABC News* (online), 29 April 2016 <http://www.abc.net.au/news/2016-04-28/png-responsible-for-manus-island-asylum-seeker-dutton-says/7369032>. On the change in the Australian government's approach see Stephanie Anderson, 'Manus Island Detention Centre to Close, Peter Dutton and PNG Prime Minister Confirm', *ABC News* (online), 18 August 2016 <http://www.abc.net.au/news/2016-08-17/manus-island-to-close-png-prime-minister-confirms/7759810>.

11 Peter Dutton, 'Manus Regional Processing Centre' (Media Release, 17 August 2016) <http://www.minister.border.gov.au/peterdutton/Pages/MANUS-REGIONAL-PROCESSING-CENTRE.aspx>.

detention centre in Manus will close,[12] the PNG Supreme Court reiterated its call for the closure of the facility and stated that any refugee status determination of the men on the island would need to be completed by the end of October 2016. The PNG Supreme Court also confirmed that it believes both Australia and PNG are jointly responsible for complying with the ruling that the centre must be closed.[13]

What has become apparent following the Supreme Court decision is that the Australian government has no official plan in place to deal with the implications of the Supreme Court judgment. When asked about the future fate of the more-than-850 men at the PNG detention centre following the findings in *Namah*, Australian Prime Minister Malcolm Turnbull replied that there was no 'road map'.[14] In the following weeks, a compromise arrangement was reached between Australia and PNG whereby refugees would not be permitted to leave the island but were permitted to leave the detention facility under certain conditions.[15] In the likely event that the new 'open centre' arrangements are found not to comply with the Supreme Court's ruling, there are few options available to Australia. Australia remains determined to deny the asylum seekers access to Australian territory. However, as explored below in Part IV, it may be required to bring the refugees to Australia.

Where does this leave the Australian Pacific Solution and what does this mean for those states looking to this 'solution' as a possible model for dealing with refugee flows? Australia is not alone in adopting third country processing and detention of asylum seekers and refugees. Its policies were inspired by the longstanding Migrant Interdiction Program of the United States.[16] However, the detention of asylum seekers and refugees on Nauru and PNG differs significantly from the detention of refugees by the United States in Guantanamo Bay, Cuba. While Australia exercises a degree of control over detainees in its extraterritorial processing and detention facilities to trigger its obligations under international

12 Ibid.

13 'Both Australia and PNG Responsible for Manus — Court', *Radio New Zealand* (online), 23 August 2016 <http://www.radionz.co.nz/international/pacific-news/311614/both-australia-and-png-responsible-for-manus-court>.

14 Michael Koziol, ''You Can't Answer the Question': Peter Dutton Struggles to Explain Plans to Karl Stefanovic Following Manus Closure', *The Sydney Morning Herald* (online), 28 April 2016 <http://www.smh.com.au/federal-politics/political-news/you-cant-answer-the-question-peter-dutton-struggles-to-explain-plans-following-manus-closure-20160427-gogqdh.html#ixzz48F2S0Owf>. The Australian government reports that there were 833 men in the Manus facility on 1 July 2016: Department of Immigration and Border Protection, 'Immigration Detention and Community Statistics Summary' (31 July 2016) 4 <http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-july-2016.pdf>.

15 Eric Tlozek, 'Manus Island: Asylum Seekers and Refugees No Longer in Detention, PNG Authorities Say', *ABC News* (online), 12 May 2016 <http://www.abc.net.au/news/2016-05-12/png-authorities-say-manus-refugees-no-longer-in-detention/7407826>. Peter Dutton also stated in April 2016 that PNG has 'already put in place … an open centre style arrangement, which may deal with some of the concerns that the judges had and they may well be able to continue operating a facility of some description': 2GB, 'Manus Island Declared Illegal', *The Ray Hadley Morning Show*, 28 April 2016 (Ray Hadley interview with Peter Dutton) <http://www.2gb.com/article/ray-hadley-manus-island-declared-illegal>.

16 See Azadeh Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantanamo Bay* (Cambridge University Press, 2015).

human rights law,[17] the level of control exercised by Australia in third country processing facilities is different to that of the United States which exercises 'complete jurisdiction and control over' Guantanamo Bay and 'maintains *de facto* sovereignty' over the area in question.[18] Furthermore, Australia is alone in having extraterritorial processing and detention as a central tenet of its border protection regime. Australia's policies should also be differentiated from the recent European Union ('EU')-Turkey deal to handle unlawful arrivals. This is because the European agreement is comprised of processing certain asylum seekers within Greece (so *within* the EU), with expulsions of rejected asylum seekers to Turkey.[19] In fact, the radical nature of Australia's policy of extraterritorial processing is highlighted by the rejection by the EU, thus far, of similar policies.[20]

The detention of asylum seekers in Manus Island has been highly problematic for Australia and PNG.[21] The UN Special Rapporteur Against Torture has

17 Azadeh Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?' (2015) 38 *University of New South Wales Law Journal* 669.

18 *Boumediene v Bush,* 553 US 723, 755 (2008) (emphasis in original).

19 See Steve Peers, 'The Final EU/Turkey Refugee Deal: A Legal Assessment' on Steve Peers, *EU Law Analysis* (18 March 2016) <http://eulawanalysis.blogspot.com.au/2016/03/the-final-euturkey-refugee-deal-legal.html>. The agreement provides that '[m]igrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities' in accordance with EU law. However, any person not applying for asylum, or whose claim is found to be 'unfounded' or 'inadmissible' under Directive 2013/32/EU of the European Parliament and of the Council [2013] OJ L 180/60 ('EU Asylum Procedures Directive'), will be returned to Turkey. The EU Asylum Procedures Directive requires that a person can only be readmitted to a 'safe third country' which can guarantee effective access to protection. The finding that Turkey meets that requirement has been questioned, see Cavidan Soykan, 'Access to International Protection — Border Issues in Turkey' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing, 2017) (forthcoming); Orçun Ulusoy, 'Turkey As a Safe Third Country?' on University of Oxford, *Border Criminologies* (29 March 2016) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third>.

20 In March 2003, the UK government suggested that the EU adopt processing of asylum claims in 'regional protection areas'. The House of Lords European Union Committee did not however support the proposal: see European Union Committee, *Handling EU Asylum Claims: New Approaches Examined*, House of Lords Paper No 74, Session 2003–04 (2004) 34–5 [96]–[101] <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/74/74.pdf>. Since then, there have been various proposals for offshore processing: see, eg, European Political Strategy Centre, 'Legal Migration in the EU: From Stop-Gap Solutions to a Future-Proof Policy' (EPSC Strategic Notes Issue 2/2015, European Commission, 30 April 2015) 4 <http://ec.europa.eu/epsc/pdf/publications/strategic_note_issue_2.pdf>. However, this has not yet been formally adopted as EU policy.

21 As this paper is concerned with the extraterritorial processing arrangements in PNG, discussions will be limited to the PNG facility but it should be noted that the detention centre in Nauru has not been without incident or criticism: see, eg, Amnesty International, *What We Found on Nauru* (17 December 2012) <http://www.amnesty.org.au/refugees/comments/30726/>; UNHCR, *UNHCR Monitoring Visit to the Republic of Nauru 7 to 9 October 2013* (26 November 2013) <http://unhcr.org.au/wp-content/uploads/2015/05/2013-12-06-Report-of-UNHCR-Visit-to-Nauru-of-7-9-October-2013.pdf>; 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, 20 March 2015) <http://apo.org.au/resource/review-recent-allegations-relating-conditions-and-circumstance-regional-processing-centre>; Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea: Interim Report* (2016).

found that numerous aspects of Australia's policies in PNG violate the right of detainees to be free from torture or 'cruel, inhuman or degrading treatment', as provided by arts 1 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*').[22] The centre has been plagued by allegations of rape and other sexual assaults;[23] overcrowding and poor conditions;[24] lack of fairness and transparency in asylum determinations;[25] and repeated concerns regarding the lack of safety for the detainees.[26] It has been the site of a murder of a young man seeking protection,[27] and the death of another from a rare bacterial infection that a number of leading health professionals believe could have been prevented with better medical care.[28] On 2 May 2016 the United Nations High Commissioner for Refugees ('UNHCR') released a very strong condemnation of conditions for detainees on Australia's extraterritorial detention facilities, including those on Manus, stating:

> There is no doubt that the current policy of offshore processing and prolonged detention is immensely harmful … Despite efforts by the Governments of Papua

22 Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — Addendum — Observations on Communications Transmitted to Governments and Replies Received*, 31st sess, Agenda Item 3, UN Doc A/HRC/31/57/Add.1 (24 February 2016) 8–11; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

23 Liam Cochrane and Wesley Manuai, 'PNG Police Confirm Manus Island Attempted Rape Allegations, Demand Return of Accused Australians', *ABC News* (online), 30 July 2015 <http://www.abc.net.au/news/2015-07-29/police-confirm-manus-island-attempted-rape-allegations/6656876>; SBS, 'Rape and Torture on Manus Island: Whistleblower', *Dateline*, 24 July 2013 <http://www.sbs.com.au/news/article/2013/07/24/rape-and-torture-manus-island-whistleblower>.

24 Amnesty International, *Manus Island Is Still Breaking People* (18 July 2014) <http://www.amnesty.org.au/refugees/comments/35068/>; Amnesty International, *This Is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (December 2013) <http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf>; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014).

25 Human Rights Watch, *World Report 2015: Papua New Guinea* <https://www.hrw.org/world-report/2015/country-chapters/papua-new-guinea>.

26 Ibid; Amnesty International, *Manus Island Is Still Breaking People* (18 July 2014) <http://www.amnesty.org.au/refugees/comments/35068/>; Amnesty International, *This Is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (December 2013) <http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf>; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014).

27 Altercations at the centre in February 2014 resulted in the murder of 23-year-old Reza Barati and the injury of 62 other asylum seekers. See Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) 98–9. Two PNG nationals have been convicted of the murder of Mr Barati: Eric Tlozek, 'Reza Barati Death: Two Men Jailed over 2014 Murder of Asylum Seeker at Manus Island Detention Centre', *ABC News* (online), 19 April 2016 <http://www.abc.net.au/news/2016-04-19/reza-barati-death-two-men-sentenced-to-10-years-over-murder/7338928>.

28 Hamid Khazaei died from a blood infection while detained in Manus Island. Doctors spoke about the prevention of the death to the program Four Corners: ABC, 'Bad Blood', *Four Corners*, 25 April 2016 <http://www.abc.net.au/4corners/stories/2016/04/25/4447627.htm>.

> New Guinea and Nauru, arrangements in both countries have proved completely untenable.[29]

Prior to any court decision on its constitutionality, the centre was called a 'problem' by the PNG Prime Minister which 'has done a lot more damage … than anything else' to the reputation of PNG.[30] The PNG Prime Minister declared that the centre would, at some stage, have to be closed.[31] The ruling of the PNG Supreme Court in *Namah* was the impetus to do just that.

The PNG Court's finding as to the unlawfulness of the detention centre is a recognition of the legal failure of the extraterritorial detention and processing regime in PNG. In order to address this issue, this paper will begin in Part II by tracing the history of extraterritorial processing and detention in Australia's extraterritorial processing centre in PNG, the closure of the centre under the previous incarnation of the Pacific Solution,[32] as well as the political compromises that led to the centre's re-opening. It will analyse the shortcomings of the legally complicated arrangements between PNG and Australia. In Part III the paper will discuss the PNG Supreme Court decision in *Namah*, before following on in Part IV to analyse the options available to Australia and PNG following the decision in *Namah* given Australia's reluctance to resettle refugees in Australia: opening the gates to the centre as an attempt to satisfy the Supreme Court and the possible resettlement of the men in PNG or a third country. The paper will conclude in Part V by reflecting upon the implications of the *Namah* decision.

This paper argues that the PNG experiment should not be viewed as an isolated event that is unique to the choice of PNG as an extraterritorial processing site. Rather, the number of legal challenges, the criticism of the extraterritorial processing regime from numerous national and international bodies, and the political tensions caused in PNG and Australia are illustrative of the unsustainability of extraterritorial models more generally as a means of addressing refugee flows.[33] Australia's approach is no solution to the growing displacement of people globally and should not be seen as an attractive option by any state tackling large numbers

29 UNHCR, 'UNHCR Calls for Immediate Movement of Refugees and Asylum-Seekers to Humane Conditions' (Statement, 2 May 2016) <http://unhcr.org.au/wp-content/uploads/2015/05/UNHCR-Calls-for-Immediate-Movement-of-Refugees-and-Asylum-Seekers-to-Humane-Conditions-.pdf>.

30 Peter O'Neill, 'Westpac Address at the National Press Club' (Speech delivered at the National Press Club, Canberra, 3 March 2016).

31 Ibid. See also Nicole Hasham, 'PNG Prime Minister Peter O'Neill Calls Manus Island Refugee Centre a "Problem" that Should End', *The Sydney Morning Herald* (online), 4 March 2016 <http://www.smh.com.au/federal-politics/political-news/png-prime-minister-peter-oneill-calls-manus-island-refugee-centre-a-problem-that-should-end-20160303-gn9l1n.html>.

32 'Pacific Solution Mark I', between the years 2001–07.

33 A refugee is defined in art 1 of the *Convention relating to the Status of Refugees*, signed 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*') as a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. A person who meets this definition is considered a refugee with rights under international law from the moment they meet the definition, not from the moment they are assessed: UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/Rev.3 (December 2011) 9 [28].

of people seeking its protection. The only real viable option for Australia now is to transfer refugees from Manus Island back to Australia and to offer the men a durable solution in its own territory.

II FAILURE AS A POLITICAL INEVITABILITY?: PACIFIC SOLUTION MARK I AND THE RE-OPENING OF THE CENTRE

A *The History of Extraterritorial Processing*

Australia first adopted extraterritorial processing and detention of refugees in 2001 when its former protectorates of Nauru and PNG agreed to host such facilities in exchange for significant increases in aid.[34] The bilateral agreements finalised with these countries for extraterritorial processing and detention represent a highly asymmetrical, hierarchical relationship where a wealthy, industrialised nation is seeking to outsource its protection obligations to developing nations. The use of aid is a significant leverage and a means of Australia being able to exercise considerable political and legal influence in PNG and Nauru.

The Pacific Solution, as the extraterritorial detention and processing regime came to be known,[35] was flawed from the outset. The growing financial cost of extraterritorial processing,[36] reports of the deteriorating health of detainees in Australia's extraterritorial detention and processing facilities,[37] growing opposition within the Australian community, and the reduced number of boats coming to Australia with asylum seekers led the Australian government to cease operation of the PNG facility in 2004. The detention centre in Nauru 'continued to be utilised until December 2007, when Australia's newly elected

34 See generally Tania Penovic and Azadeh Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime' (2007) 13(1) *Australian Journal of Human Rights* 33.

35 For a period, the Australian government attempted to rebrand the 'Pacific Solution' as the 'Pacific Strategy': See Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006) 117.

36 A Just Australia and Oxfam Australia have argued that the Pacific Solution cost Australia in excess of one billion dollars over the period 2001–07. See Kazimierz Bem et al, 'A Price Too High: The Cost of Australia's Approach to Asylum Seekers' (Research Project, A Just Australia, Oxfam Australia and Oxfam Novib, August 2007) < http://resources.oxfam.org.au/filestore/originals/OAus-PriceTooHighAsylumSeekers-0807.pdf> 15.

37 As noted by Janet Phillips,

> [w]hile similar adverse mental health effects on asylum seekers had been noted in Australia's onshore immigration facilities, the more challenging physical conditions of the offshore processing centres; the lack of independent scrutiny; and the lengthy periods of time that many asylum seekers spent on Nauru and Manus Island while their claims were being processed were of particular concern to many critics of the 'Pacific Solution':

Janet Philips, 'The 'Pacific Solution' Revisited: A Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island' (Background Note, Parliamentary Library, Parliament of Australia, 2012) 8 <http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload_binary/1893669.pdf>; see also ibid 16–20.

Labor government ended what it labelled the "cynical, costly and ultimately unsuccessful exercise" of extraterritorial detention and processing'.[38]

The closure of the extraterritorial detention and processing centres, however, was not without controversy. The move was met with strong criticism from the Liberal and National Party Coalition, then in opposition, who linked the end of extraterritorial processing and detention by Australia to the increase in the number of asylum seekers accessing Australian territory.[39] The drowning of a number of asylum seekers travelling by boat to Australia also added increasing pressure on the Labor government to curb the flow of asylum seekers to Australia.[40]

Initially reluctant to re-open the facilities in PNG and Nauru, the Labor government sought alternative arrangements. However, an agreement with Malaysia, signed in July 2011 to swap 800 asylum seekers detained on Australian territory with 4000 refugees awaiting resettlement in Malaysia, was found to be unlawful by the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*Malaysia Solution Case*').[41] Australia also entered into discussions with East Timor for a detention centre on East Timorese territory. Such a proposal was rejected by the emerging nation.[42] The reluctance of nations such as East Timor to accept Australia's extraterritorial processing and detention model highlights the lack of appeal of such policies for many receiving countries, and the political and legal consequences of such actions that can be foreseen by many of Australia's neighbours.

At an impasse, the Labor government engaged an expert panel to provide advice on preventing asylum seekers risking their lives on dangerous boat journeys to Australia.[43] One element of the wide-ranging recommendations made by the expert panel was the reopening of the extraterritorial detention and processing

38 Dastyari, 'Detention of Australia's Asylum Seekers in Nauru', above n 17, quoting Chris Evans, 'Last Refugees Leave Nauru' (Media Release, 8 February 2008) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYUNP6%22>.

39 Mary Crock, 'First Term Blues: Labor, Refugees and Immigration Reform' (2010) 17 *Australian Journal of Administrative Law* 205, 206. See also Mary Crock and Daniel Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals' (2010) 19 *Griffith Law Review* 238.

40 Sharon Pickering and Leanne Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39 *Law and Social Inquiry* 1006; Leanne Weber, 'Visible and Virtual Borders: Saving Lives by 'Seeing' Sovereignty' (2013) 22 *Griffith Law Review* 666, 667. On the deaths of asylum seekers en route to Australia at sea, see generally Leanne Weber and Sharon Pickering, 'Counting and Accounting for Deaths of Asylum-Seekers En Route to Australia' in Tara Brian and Frank Laczko (eds), *Fatal Journeys: Tracking Lives Lost during Migration* (International Organization for Migration, 2014) 177. See also Robin Rothfield (ed), *The Drownings' Argument — Australia's Inhumanity: Offshore Processing of Asylum Seekers* (Labor for Refugees, 2014).

41 (2011) 244 CLR 144.

42 Lindsay Murdoch, 'East Timor Dumps Bilateral Talks on Refuge Centre', *The Sydney Morning Herald* (online), 29 April 2011 <http://www.smh.com.au/national/east-timor-dumps-bilateral-talks-on-refugee-centre-20110428-1dynq.html>.

43 Expert Panel on Asylum Seekers, *Report of the Expert Panel on Asylum Seekers* (August 2012) <http://artsonline.monash.edu.au/thebordercrossingobservatory/files/2015/03/expert_panel_on_asylum_seekers_full_report.pdf>.

facilities in Nauru and PNG.[44] It should be noted that this recommendation was not supported by civil society more generally in Australia. Almost all of the submissions to the expert panel during their deliberation period, by a wide range of organisations and individuals, recommended that the expert panel refrain from endorsing extraterritorial processing and detention.[45] Nevertheless, the Labor government embraced the call for a resumption of extraterritorial detention and processing in Nauru and Manus Island.[46]

B *Legal Arrangements in PNG*

In order to resume extraterritorial processing and detention in PNG and Nauru, the Australian government first had to overcome the ruling of the High Court in the *Malaysia Solution Case* which found Australia's extraterritorial detention and processing regime to be inconsistent with s 198A of the *Migration Act 1958* (Cth) ('*Migration Act*') (as it then was). The Australian government thus repealed s 198A of the *Migration Act* and introduced a new s 198AB, which empowers the Minister for Immigration to designate a country as a 'regional processing country'. The only criterion that must be met by the Minister for Immigration is that 'the Minister thinks that it is in the national interest to designate the country to be a regional processing country'.[47] Furthermore, s 198AD of the *Migration Act* now mandates an officer to 'as soon as reasonably practicable, take [an unauthorised maritime arrival][48] … from Australia to a regional processing country'. The compatibility of the new ss 198AB and 198AD of the *Migration Act* with the *Australian Constitution* was upheld by the High Court of Australia in *Plaintiff S156/2013 v Minister for Immigration and Border Protection* ('*Plaintiff S156*').[49]

PNG was designated as a 'regional processing country' on 9 October 2012.[50] Australia and PNG have signed a number of agreements to facilitate the detention and processing of asylum seekers in PNG. Australia began transferring asylum seekers to PNG in 2012 pursuant to a Memorandum of Understanding ('MOU')

44 Ibid 16 (Recommendation 8 and Recommendation 9).

45 See, eg, Robin Rothfield (ed), *Alternatives to Offshore Processing: Submissions to the Expert Panel on Asylum Seekers 2012* (Labor for Refugees, 2013) <http://apo.org.au/files/Resource/lfr_alternatives-to-offshore-processing_2013.pdf>.

46 The move to return to extraterritorial detention and processing was enthusiastically supported by the Coalition in opposition. ABC, 'Critics Question Asylum Policy's Legality and Morality', *7.30 Report*, 30 July 2013 (Tony Abbott) <http://www.abc.net.au/7.30/content/2013/s3814610.htm>.

47 The amendments were made pursuant to the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) sch 1 item 25.

48 As defined in *Migration Act* s 5AA.

49 (2014) 254 CLR 28.

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

signed with the government of PNG in September 2012.[51] The first cohort of asylum seekers arrived in PNG on 21 November 2012 and included women and children.[52] However, poor conditions in the detention facility led to the removal of women and children from the centre in June 2013.[53]

While women and children were initially detained alongside men in the PNG detention facility, all women and children were removed from the centre by July 2013.[54] At the time of writing, only men were detained at the facility. In contrast, the facility in Nauru continues to be used for family groups, including women and children as well as single men.

The nature of PNG's involvement expanded to include resettlement of refugees when a further bilateral agreement between Australia and PNG was signed on 19 July 2013, known as the 'Regional Resettlement Arrangement'.[55] An additional MOU between Australia and PNG was also signed in August 2013 ('2013 MOU').[56] The 2013 MOU replaces the 2012 MOU between the two countries but supplements the 'Regional Resettlement Arrangement' signed in July 2013.[57] The 2013 MOU provides a more comprehensive framework around the general arrangement reached between the two nations under the 'Regional Resettlement Arrangement' and details the rights and responsibilities of the two nations with greater specificity. As such, the 'Regional Resettlement Arrangement' and the

51 Independent State of Papua New Guinea and Commonwealth of Australia, *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues* (Intergovernmental Agreement, 8 September 2012). Australia also signed an initial MOU with Nauru on 29 August 2012: *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, (Intergovernmental Agreement, 29 August 2012). The transfers were only possible following amendments to the *Migration Act*. See Michelle Foster, 'The Implications of the Failed 'Malaysian Solution': The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 *Melbourne Journal of International Law* 395, 422.

52 Elibritt Karlsen, 'Australia's Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics' (Research Paper Series, Parliamentary Library, 2016) 3 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/Offshore>.

53 James Robertson, 'Children Taken off Manus Island', *The Sydney Morning Herald* (online), 20 June 2013 <http://www.smh.com.au/federal-politics/political-news/children-taken-off-manus-island-20130620-2olze.html>; 'Children Removed from Manus Asylum Centre', *SBS News* (online), 4 July 2013 <http://www.sbs.com.au/news/article/2013/07/04/children-removed-manus-asylum-centre>.

54 Asylum Seeker Resource Centre, 'Children in Detention' <https://www.asrc.org.au/wp-content/uploads/2013/07/Children-in-Detention_August-2013.pdf>.

55 Independent State of Papua New Guinea and Commonwealth of Australia, *Regional Resettlement Arrangement between Australia and Papua New Guinea* (Intergovernmental Agreement, 19 July 2013).

56 See Independent State of Papua New Guinea and Commonwealth of Australia, *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues* (Intergovernmental Agreement, 6 August 2013) ('2013 MOU').

57 Clause 13 of the 2013 MOU provides that 'The Government of Papua New Guinea undertakes to enable Transferees who enter Papua New Guinea under this MOU who it determines are refugees to settle in Papua New Guinea'.

2013 MOU were the relevant agreements between Australia and PNG at the time of the Supreme Court decision in *Namah*.

As a sign of the political volatility of the agreement with Australia, the PNG Prime Minister denied the major tenet of the 2013 agreements with Australia, arguing less than two weeks after the signing of the 2013 MOU that he had not agreed to settle all asylum seekers who were found to be refugees in Manus, and that Australia would need to participate in the resettlement of some refugees from the centre.[58] This statement, which contradicted Australia's position, was retracted in a further statement the next day, reconfirming PNG's support for the agreement with Australia.[59] Yet, the PNG Prime Minister reiterated in March 2016 that the asylum seekers and refugees transferred to Manus Island by Australia could not 'remain in Manus forever' and that PNG could not afford to resettle all those found to be refugees. [60]

Significantly for the discussions in this paper, cl 5 of the 2013 MOU provides: 'The Government of Papua New Guinea will conduct all activities in respect of this MOU in accordance with its Constitution and all relevant domestic laws.'[61] For example, ss 3, 7 and 20 of the *Migration Act 1978* (Papua New Guinea) require any non-citizen to hold an entry permit unless they are exempt by the Minister for Foreign Affairs.[62] Under cl 14 of the 2013 MOU, transferees are 'to be lawful during their stay in Papua New Guinea' and are issued entry permits.[63]

Under the agreements with PNG, all costs associated with the arrangement are to be borne by Australia.[64] However, cl 4 of the July 2013 Regional Resettlement Arrangement states that '[t]he regional processing centre will be managed and administered by Papua New Guinea under Papua New Guinea law, with support

58 Mark Baker, 'PNG Says It Can't Keep All Refugees', *The Sydney Morning Herald* (online), 17 August 2013 <http://www.smh.com.au/federal-politics/federal-election-2013/png-says-it-cant-keep-all-refugees-20130816-2s28l.html>.

59 Paul Maley, 'PNG Refugees Could Still Come Here', *The Australian* (online), 19 August 2013 <http://www.theaustralian.com.au/national-affairs/png-refugees-could-still-come-here/story-fn59niix-1226699574143>.

60 O'Neill, above n 30. See also Hasham, 'PNG Prime Minister Peter O'Neill Calls Manus Island Refugee Centre a "Problem" that Should End', above n 31.

61 A similar provision exists in cl 4 of the 2013 MOU requiring Australia to conduct all activities in respect of the MOU in accordance with the *Australian Constitution* and relevant municipal laws.

62 For a discussion see Savitri Taylor, 'Australian Neo-Colonialism in the Pacific: Immigration Detention in Papua New Guinea' in Amy Nethery and Stephanie J Silverman (eds), *Immigration Detention: The Migration of a Policy and Its Human Impact* (Routledge, 2015) 136.

63 Clause 10 of the agreement identifies individuals that can be transferred to PNG ('transferees') as those who:

a) have travelled irregularly by sea to Australia; or
b) have been intercepted at sea by the Australian authorities in the course of trying to reach Australia by irregular means; and
c) are authorised by Australian law to be transferred to Papua New Guinea; and
d) have undergone a short health, security and identity check in Australia.

64 Clause 6 of the 2013 MOU. It is interesting to note that cl 7 of the 2013 MOU states that Australia is also required to fund a package of assistance and other bilateral cooperation in 'addition to the current allocation of Australian development cooperation assistance to PNG'. See also cl 9 of the July 2013 Regional Resettlement Arrangement: 'Australia will bear the full cost of implementing the Arrangement in Papua New Guinea for the life of the Arrangement.'

from Australia'. Nevertheless, Australia does in fact pay for the operating costs of the centre, and in addition maintains a permanent presence at the detention facility and makes decisions about the day-to-day operation of the centre.[65]

III THE *PNG CONSTITUTION* AND THE SUPREME COURT DECISION IN *NAMAH*

A *The* PNG Constitution

As noted above, the litigation in *Namah* centred on the right to liberty and related provisions in the *PNG Constitution*. PNG gained independence from Australia in 1975,[66] and the *PNG Constitution* came into effect that same year.[67] It is an expansive and liberal document containing many important human rights protections. Indeed, it has been described by one scholar as 'unique and innovative'.[68] It is the entrenched, supreme law of PNG, a status that the Supreme Court has underlined in a number of judgments.[69]

The provision which was central to *Namah* was s 42 of the *PNG Constitution*. This provides that '[n]o person shall be deprived of his personal liberty', except in defined, limited circumstances.[70] Section 42(1)(g) provides that one of the exceptions to the right to liberty is where this is

> for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes.[71]

65 See Castan Centre for Human Rights Law, Submission No 7 to Legal and Constitutional Affairs References Committee, *Inquiry into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, May 2014, 3.

66 Section 4 of the *Papua New Guinea Independence Act 1975* (Cth) states that Australia withdraws all sovereign rights over PNG.

67 The final draft was ratified on 15 August 1975 and came into effect on 16 September 1975. For a discussion of the drafting of the *PNG Constitution*, see John Goldring, *The Constitution of Papua New Guinea: A Study in Legal Nationalism* (Law Book, 1978); Peter J Bayne, 'Judicial Method and the Interpretation of Papua New Guinea's Constitution' (1980) 11 *Federal Law Review* 121.

68 John Goldring, 'Book Review of Constitutional Law of Papua New Guinea, by Eric L Kwa and Twenty Years of the Papua New Guinea Constitution, edited by Anthony J Regan, Owen Jessep and Eric L Kwa' (2002) 13 *Public Law Review* 143, 143.

69 See, eg, *In re Constitutional (Amendment) Law 2008, Reference by the Ombudsman Commission of Papua New Guinea* [2013] Papua New Guinea Supreme Court 67 [51]. The Supreme Court stated
> We have expressed in the past that the *Constitution* is the supreme authority and even the Parliament is subservient to it and neither the Parliament nor the elected representatives in the Parliament have the power to pass or make laws that diminishes that authority given to the Commission to act according to the wishes and aspirations of the *Constitution* which is the mother law of the land.

70 *PNG Constitution* s 42. The listed exceptions include criminal offences, quarantine breaches and guardianship matters.

71 The fact that s 42(1)(g) refers to 'unlawful entry' was pivotal to the Supreme Court case as in fact Australian 'transferees' are brought to PNG as lawful entrants. Therefore, the applicant argued that they do not come within the scope of the exception in s 42(1)(g).

The importance of the right to liberty as a fundamental human rights protection is recognised in the constitutions and jurisprudence of many countries around the world.[72] Similar protections to that of s 42 of the *PNG Constitution* are set out in art 5 of the *European Convention on Human Rights* ('*ECHR*'),[73] and the *Constitution of Nauru*.[74] Indeed, the similarity between the *PNG Constitution* and art 5 of the *ECHR* was referred to in *Namah,*[75] as well as in earlier PNG jurisprudence.[76] No such constitutionally-guaranteed protection of liberty exists in the *Australian Constitution*.[77]

However, in 2014, the government pushed for an amendment to s 42 in an attempt to forestall the Supreme Court litigation which had just been commenced in *Namah*. This was passed by the PNG Parliament that same year.[78] Thus, from 2014 onwards, s 42(1)(ga) of the *PNG Constitution* provides that deprivation of liberty is permitted 'for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organisation that the Minister responsible for immigration matters, in his absolute discretion, approves'.

As the Court in *Namah* noted, Parliament did not pass any Act of Parliament to give effect to the provisions of s 42(1)(ga).[79]

In addition to s 42, other companion provisions of the *PNG Constitution* set out considerations for assessing the validity of any restriction of rights. Importantly, ss 38 and 39 of the *PNG Constitution* permit consideration of the proportionality

72 See *United States Constitution* amend XIV; *Canada Act 1982* (UK) c 11, sch B pt I s 7 ('*Canadian Charter of Rights and Freedoms*'); *Constitution of Nauru* art 5; *PNG Constitution* s 42. See also *R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening)* [2012] 1 AC 245, 272 (Lord Dyson SCJ): 'It is not in dispute that the right to liberty is of fundamental importance and that the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights and/or constitutes the commission of a tort.'

73 *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 5(1):

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law .... (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

See also the liberty provisions set out in arts 9 and 10 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

74 *Constitution of Nauru* art 5(1): 'No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases … (h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.'

75 [2013] Papua New Guinea Supreme Court 13, 13 [30].

76 In *Application by Ireeuw* [1985] PNGLR 430, 437, Cory J noted that s 42(1) of the *PNG Constitution* was in terms similar to the provisions of art 5 of the *European Convention on Human Rights* as interpreted by the European Court of Human Rights in *Guzzardi v Italy* (1980) 3 EHRR 333: see ibid.

77 See Kerry Murphy, 'Paying for Stopping the Boats', *Eureka Street* (online), 28 April 2016 <http://www.eurekastreet.com.au/article.aspx?aeid=47259#.VywYl1V97IW>: 'The former colony of PNG has better constitutional protections of human rights than that of their former colonial master'.

78 *Constitutional Amendment (No 37) (Citizenship) Law 2014* (Papua New Guinea).

79 [2013] Papua New Guinea Supreme Court 13, 10 [22]. The Court noted that the only Act that would be relevant is the *Migration Act 1978* (Papua New Guinea).

of any restrictions, as well as a broad list of international law sources and comparative jurisprudence. Section 38 provides that where a law regulates or restricts a right, the State must show that the law is 'reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind'.[80] This is interesting as it is similar to principles established in European human rights law.[81] Section 39(3) of the *PNG Constitution* expands upon this, stating that for the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society, a PNG court may have regard to a wide array of factors, including the *Charter of the United Nations*, the *Universal Declaration of Human Rights*,[82] the *ECHR*,[83] international and regional human rights cases,[84] declarations by the International Commission of Jurists and other similar organisations, and 'any other material that the court considers relevant'.[85]

Naturally, it would be open to the PNG Supreme Court to consider international law and the jurisprudence of other jurisdictions without this provision. However, the fact that such considerations are explicitly set out in the *PNG Constitution* is significant as they give the Court an entrenched legal imprimatur to do this. This can be contrasted to the Australian approach where there are no constitutional directions to courts to take into account UN treaties or other international law in interpreting legislation.[86] The High Court has been reluctant to imply international law considerations in statutory interpretation[87] and Australian

80 *PNG Constitution* s 38(1)(b).

81 *ECHR* arts 8–11. See, eg, *ECHR* art 8(2) on the right to respect for private and family life:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Court of Human Rights has also implied this into other articles in the *ECHR* which do not specifically contain the clause. The Court has also held that '[i]t must now be decided whether the "interference" complained of corresponded to a "pressing social need," whether it was "proportionate to the legitimate aim pursued," [and] whether the reasons given by the national authorities to justify it are "relevant and sufficient"': *Sunday Times v United Kingdom* (1979–80) 2 EHRR 245, [62].

82 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948). The list also includes 'and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms': *PNG Constitution* s 39(3)(c).

83 The list also includes 'and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms': *PNG Constitution* s 39(3)(d).

84 *PNG Constitution* s 39(3)(e): 'judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms'.

85 *PNG Constitution* s 39(3)(i)–(j).

86 See Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 428:

> The *Australian Constitution* says little about international law. The key sections that envisage some form of intersection with the international legal order are s 51(xxix), which grants the federal Parliament the power to enact legislation with respect to 'external affairs', and s 75(i) which vests the High Court with original jurisdiction in relation to 'matters arising under a treaty'. The *Constitution* makes no reference to three crucial issues: the method of Australia's entry into binding legal relationships on the international stage; the legal effect of international law within the domestic legal system; and the responsibility for enforcement of such obligations at the domestic level.

87 See discussion below at pt III C (2).

migration legislation now specifically dilutes the significance of international law considerations.[88]

B *The Court Decision in* Namah

The Supreme Court of PNG found the detention of asylum seekers and recognised refugees in the processing centres was unconstitutional for a number of reasons. First, the power pursuant to s 42(1)(g) of the *PNG Constitution* is only available against persons who have entered or remain in the country without a valid entry permit. In the present case, the asylum seekers did not enter PNG or remain there of their own accord. In fact, they were forcibly transferred and detained on Manus Island by the PNG and Australian governments.[89]

The Court also found the 2014 amendment to the *PNG Constitution* to be invalid. It held that the PNG government had failed to discharge the legal burden of demonstrating to the satisfaction of the Court that the amendment was 'reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind' having regard to s 38 of the *PNG Constitution*.[90] Significantly, the Court considered broader material than PNG law in coming to this conclusion (as it is explicitly permitted to do pursuant to s 39), including UNHCR Detention Guidelines, the 1951 *Refugee Convention* and a damning report by the UNHCR published on the Manus Island processing centre in 2013:

> Treating those required to remain in the relocation centre as prisoners irrespective of their circumstances or their status save only as asylum seekers, is to offend against their rights and freedoms as guaranteed by the various conventions on human rights at international law and under the *PNG Constitution*.[91]

In concluding that the 2014 amendment was invalid, the Court specifically stated that '[t]he human rights and dignity of the detainees or the asylum seekers which are guaranteed by the relevant provisions of the *Constitution* need to be respected'.[92] This is significant as an endorsement of the status of asylum seekers as entitled to human rights under the *PNG Constitution*, rather than categorising them as 'non-citizens' and therefore not entitled to constitutional or other rights protections.

It is also important that the Court did not simply focus on the *fact* of detention in rendering the detention at Manus unconstitutional, it also considered the *condition*s of detention to be relevant. For instance, in considering the restriction

88 See, eg, the *Maritime Powers Act 2013* (Cth), which makes no express reference to Australia's international legal obligation of *non-refoulement* of refugees. Rather it provides, inter alia, that the authorisation and exercise of detention powers is not invalid because of any failure to consider, or defective consideration of, Australia's international obligations, or because the authorisation or exercise of power is inconsistent with those obligations: *Maritime Powers Act 2013* (Cth) ss 22A, 75A.

89 *Namah* [2013] Papua New Guinea Supreme Court 13, 15–6 [38]–[39].

90 Ibid 21 [54].

91 Ibid 24–5 [66]–[69], citing UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention* (2012); *Refugee Convention*.

92 *Namah* [2013] Papua New Guinea Supreme Court 13, 21 [56].

of liberty pursuant to s 38, the Court noted that an additional consideration was whether 'the *conditions* of detention are such as to damage the rights and dignity of the detainees or, worse, causes physical or mental suffering'.[93]

In this regard, the Court did not simply focus on s 42 of the *PNG Constitution* which protects liberty, but also *other freedoms* in the *PNG Constitution*. This is reflected in the orders made by the Court. First, the Court held that:

> The detention *and the way in which the asylum seekers are treated at the Manus Island Relocation or Processing Centre* in so far as they affect their other constitutional rights and freedoms such as the right to freedom under s 32 of the Constitution are unconstitutional and are also ultra vires the powers available under the *Migration Act*.[94]

Further, the Court ordered both governments 'take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees on Manus Island *and* the continued breach of the asylum seekers [sic] or transferees [sic] Constitutional and human rights'.[95] The fact that the Court referred to the detention of asylum seekers and refugees *and* breach of their constitutional and human rights suggests that the act of detention was not the only basis upon which the Court found the Manus detention centres to be unconstitutional. The use of 'and' in the order indicates that it was the Court's intention that not only should the two governments cease the detention of the asylum seekers, but *also* cease breaching their rights.

C *Key Features of the Decision*

The PNG Supreme Court decision in *Namah* is important for recognising that asylum seekers have a right to liberty like any other person in PNG. It is also illustrative of the power of having a Bill of Rights in a domestic constitution and a court which is able and willing to interpret this to protect asylum seekers as human beings entitled to human rights[96] (not merely as 'non-citizens' or 'illegals'

93 Ibid 34 [118] (emphasis added).

94 Ibid 27 [74] (emphasis added). The relevance of s 32 to any future litigation is discussed in pt IV below.

95 Ibid 28 [74] (emphasis added).

96 Note that courts in a number of jurisdictions have held that the constitutional right to liberty applies to non-citizens within territory as well as citizens. For instance, s 7 of the *Canadian Charter of Rights and Freedoms* says '[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. The Canadian Supreme Court has held that this protection applies to everyone within Canadian territory: '[t]he term "everyone" in s 7 includes every person physically present in Canada and by virtue of such presence amenable to Canadian law': *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177, 179. See also the US Supreme Court in *Pyler v Doe*, 457 US 202 (1982) where the Court affirmed that the Fourteenth Amendment rights to liberty and due process were not confined to the protection of citizens.

which is the prism through which Australian legislation and courts view asylum seekers).[97]

1 *Judicial Protection of Asylum Seekers and Independence of the Supreme Court*

The *Namah* decision reflects a number of important features of PNG law, in particular, the independence of the PNG Supreme Court,[98] and its ability and willingness to uphold fundamental human rights. Legally, the independence of the Supreme Court is entrenched under s 157 of the *PNG Constitution*.[99] In practice, it has exercised that independence strongly in the face of obstruction and interference by the PNG government.[100] The Court's strength is notable given that serious corruption allegations have been levelled against members of the PNG

97 See, eg, *Migration Act 1958* (Cth) ss 5, 5AA, 46A, 189, particularly the significance of the status as an 'unauthorised maritime arrival'. This is illustrated by *Plaintiff S156* (2014) 254 CLR 28, a case concerning the constitutionality of extraterritorial processing on Manus Island. The plaintiffs submitted that in designating PNG as a 'regional processing country' under the *Migration Act*, the Minister was required to take into account factors including (inter alia): that the transferees would be 'arbitrarily and indefinitely detained in PNG, in torturous, inhuman and degrading conditions, without access to legal advice, representation or judicial review'; and that 'the designation decision would result in violation or breach of at least four international treaties to which Australia was a signatory': Plaintiff S156/2013, 'Plaintiff's Submissions', Submission in *Plaintiff S156 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 26 March 2014, 15. In response, the Court held that these were not mandatory considerations. To some extent, the Court was constrained by the terms of the *Migration Act* provision, but it could be argued that it was possible to interpret the section in line with human rights principles.

98 See ABC, 'Manus Island Detention Centre Decision Shows PNG's Courts and Constitution Strong: Veteran Journalist', *Pacific Beat*, 3 May 2016 (Sean Dorney) <http://www.abc.net.au/news/2016-05-03/manus-island-detention-centre-decision-shows-png's/7378452>. Justice John Logan, an Australian judge who served on the Supreme Court of PNG, described his PNG Supreme Court colleagues as 'robustly independent': Justice John Logan, 'A Year in the Life of an Australian Member of the PNG Judiciary' (Speech delivered at the 18th Commonwealth Law Conference, Federal Court of Australia, 15 April 2013) <http://www.fedcourt.gov.au/publications/judges-speeches/justice-logan/logan-j-20130415>.

99 Section 157 provides that:

> Except to the extent that this *Constitution* specifically provides otherwise, neither the Minister responsible for the National Justice Administration nor any other person or authority (other than the Parliament through legislation) outside the National Judicial System has any power to give directions to any court, or to a member of any court, within that System in respect of the exercise of judicial powers or functions.

100 There have been a number of attempts in PNG to undermine the independence of the judiciary. For instance, in 2012, the Chief Justice Sir Salamo Injia was arrested and charged with sedition. This followed judgments of the Supreme Court in two cases where the Court ruled that Michael Somare was the legitimate Prime Minister of PNG at the time, rather than Mr Peter O'Neill who had assumed office: Jessica Wright, 'Australia Urges Restraint after Arrest of PNG's Chief Justice', *The Sydney Morning Herald* (online), 25 May 2012 <http://www.smh.com.au/federal-politics/political-news/australia-urges-restraint-after-arrest-of--pngs-chief-justice-20120524-1z8iw.html>. In 2015, the PNG government moved to suspend the country's Chief Magistrate Nerrie Eliakim after she had issued the warrant of arrest for Prime Minister Peter O'Neill on 12 June 2014 in relation to corruption charges: Bianca Hall, 'Trial for Australian Lawyers Banned from PNG Begins as Chief Magistrate Suspended', *The Sydney Morning Herald* (online), 7 October 2015 <http://www.smh.com.au/federal-politics/political-news/trial-for-australian-lawyers-banned-from-png-begins-as-chief-magistrate-suspended-20151007-gk31si.html>.

government[101] and the UN has raised concerns about the rule of law in PNG.[102] This is reflected in the recalcitrance of the PNG authorities in answering the application in the *Namah* case, which the Court strongly criticised.[103] The *Namah* decision is therefore an important example of the PNG judiciary asserting its independence and role as arbiter of the *PNG Constitution*. In an era when asylum is becoming increasingly politicised, the decision also illustrates the potential role of courts in providing judicial protection of the rights of asylum seekers and refugees and highlights the power of the law to constrain executive action.[104]

The PNG Supreme Court ruling on liberty is particularly important because there is no overarching regional human rights treaty in the Asia-Pacific region. This is in contrast to Europe which has both a regional human rights instrument (the *European Convention on Human Rights*) and a supervisory body (the European Court of Human Rights) to enforce human rights protections for asylum seekers.[105] Significantly, other regions also have binding human rights regimes.[106] Although some countries in the Asia-Pacific are signatories to key international human rights instruments,[107] many are not.[108] Thus, domestic constitutional rights provisions have particular importance in countries such as PNG.

101 See Human Rights Watch, *World Report 2015: Papua New Guinea* (2015) <https://www.hrw.org/world-report/2015/country-chapters/papua-new-guinea>.

102 United Nation News Centre, *Papua New Guinea on 'Slippery Path' to Undermining Rule of Law, Warns UN Official* (27 April 2012) <http://www.un.org/apps/news/story.asp?NewsID=41877>. See also Constance Johnson, *Papua New Guinea: Controversial Law Stayed after UN Official Expressed Concerns* (1 May 2012) Library of Congress <http://www.loc.gov/law/foreign-news/article/papua-new-guinea-controversial-law-stayed-after-un-official-expressed-concerns/>.

103 *Namah* [2013] Papua New Guinea Supreme Court 13, 6–9 [13]–[19]. It stated: 'Obviously, the Respondents and their lawyers failed for no good a reason to discharge their obligation to take all steps they needed to take promptly to avoid unnecessary delays in an expedited prosecution and disposal of this case, which was filed on 1st August 2013': at 8 [17].

104 Note that the European Court of Human Rights judgment in *Hirsi Jamaa v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) ('*Hirsi*') and the Australian High Court decision in *Plaintiff M70* (2011) 244 CLR 144 are further examples of the role of courts in constraining executive action. Although we note that some commentators have raised concerns about compliance by European authorities with aspects of *Hirsi*: see Júlia Iván, 'Where Do State Responsibilities Begin and End? Border Exclusions and State Responsibility' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing, 2017) (forthcoming).

105 See, eg, *MSS v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

106 For instance, the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights. See also the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

107 Thailand, Indonesia, Vietnam, and Timor-Leste (East Timor) are parties to the *CAT*, the *ICCPR* and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966, 993 UTS 3 (entered into force 3 January 1976) ('*ICESCR*'): United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status of Treaties* (2016) United Nations Treaty Collection <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

108 Singapore and Malaysia have neither signed nor ratified the *CAT*, the *ICCPR* or the *ICESCR*: see United Nations, above n 107.

2 *Human Rights and International Law*

The *Namah* decision is in stark contrast to the approach taken by the High Court of Australia to immigration detention. Unlike PNG, Australia lacks a federal Bill of Rights[109] and thus the right to liberty is not constitutionally guaranteed. Rather, the nature of the *Australian Constitution* and Australia's migration legislation has led to the categorisation of asylum seekers as 'aliens' and 'unlawful non-citizens'[110] rather than holders of human rights. This has contributed to significant difficulties in pursuing successful legal challenges to the operation of the extraterritorial centres in PNG and Nauru in the Australian courts.[111]

The PNG Supreme Court approach to fundamental rights and international law can also be contrasted to the limited role of international law recognised by the Australian High Court. This is exemplified by the approach of the High Court in one of its most controversial judgments, *Al Kateb v Godwin*, where a majority of the Court held that mandatory indefinite detention was lawful under Australian law.[112] In this case, the majority of the Court found that there was no implication for international law, including human rights, as the relevant sections of the *Migration Act* were unambiguous.[113] In contrast, Kirby J (in a strong dissent) held that provisions of the *Migration Act* should be interpreted to avoid an interpretation of unlimited executive detention. One of the reasons was that 'it should do so because that interpretation is consistent with the principles of the international law of human rights and fundamental freedoms that illuminate our

109 Instead, constitutional challenges to the designation of 'Regional Processing Centres' have tended to rest on whether they are sufficiently linked to a legislative head of power such as the external affairs power or the aliens power. See, eg, *Plaintiff S156* (2014) 254 CLR 28.

110 The *Australian Constitution* invests parliament with broad legislative powers over 'aliens', 'immigration' and 'the people of any race for whom it is deemed necessary to make special laws': ss 51(xix), (xxvii), (xxvi). See discussion in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29–32 (Brennan, Deane and Dawson JJ), discussed in Susan Kneebone, 'The Australian Story: Asylum Seekers outside the Law' in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009) 171, 187.

111 See, eg, *Plaintiff S156* (2014) 254 CLR 28; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 ('*Plaintiff M68/2015*'). In *Plaintiff S156*, the High Court adjudicated on the constitutionality of the regional processing transfer provisions in the *Migration Act*. The High Court found that the provisions were valid under the 'aliens' power in the *Australian Constitution* and that the only mandatory condition of the exercise of power to designate a regional processing country under s 198AB(1) of the *Migration Act* was one of the formation of an opinion by the Minister that it was in the national interest to do so. In *Plaintiff M68/2015*, the High Court rejected a constitutional challenge to the plaintiff's detention at the Nauru Regional Processing Centre.

112 (2004) 219 CLR 562 ('*Al Kateb*'). Although in more recent jurisprudence the High Court has emphasised that detention must be linked to the purposes under the *Migration Act*, and has not cited *Al Kateb,* it has not overruled that case. See, eg, *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219. For a discussion of this jurisprudence, see discussion of this case law in Joyce Chia, 'Back to the *Constitution*: The Implications of *Plaintiff S4/2014* for Immigration Detention' (2015) 38 *University of New South Wales Law Journal* 628.

113 *Al Kateb* (2004) 219 CLR 562, 581, 643, 661. Per McHugh J (at 581):

> The words of ss 196 and 198 are unambiguous. They require the indefinite detention of Mr Al-Kateb, notwithstanding that it is unlikely that any country in the reasonably foreseeable future will give him entry to that country. The words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights.

understanding both of the provisions of the Act and of the *Constitution* applicable to this case'.[114]

The High Court of Australia has tended to take a conservative view, in other cases, of the relevance of international law to the construction of the *Migration Act*.[115] As Susan Kneebone has noted:

> As the very manner of incorporation of the *Refugees Convention* under the *Migration Act* demonstrates, in Australia the rights of refugees are seen by the executive as an aspect of immigration control, rather than of implementation of international treaty obligations. It is therefore unsurprising that the judiciary sometimes overlooks the human rights dimensions of the claims of these 'non-citizens'.[116]

The ability of Australian courts to interpret statutes consistently with international law is, of course, dependent on the way in which those statutes are worded. Many provisions of the *Migration Act* have been amended to severely limit statutory interpretation which would allow the recognition of international law. As noted above, s 198AB(2) of the *Migration Act* now expressly states that the only condition on the exercise of power to designate a country as a regional processing country is that the Minister for Immigration and Border Protection considers it is in the 'national interest' to do so. As part of the constitutional challenge to the PNG regional processing designation in *Plaintiff S156*, the plaintiff argued that the Minister was required to take into account matters such as the view of the UNHCR, the international obligations of PNG and its capacity to implement its international obligations, the conditions under which transferees would be detained in PNG, and breaches of Australia's international obligations following on from this designation decision.[117] However the High Court held that the only condition of the power of designation was the 'national interest', which is a

114 Ibid 630. Kirby J held that the *Australian Constitution* and the *Migration Act* are to be read in light of considerations of international law and the common law presumption in favour of personal liberty: at 616-17. McHugh J (in the majority) took a very different position and wrote a strong critique of Kirby J's reasoning. On international law, McHugh J held that 'courts cannot read the *Constitution* by reference to the provisions of international law that have become accepted since the *Constitution* was enacted in 1900': at 589; '[i]f Australian courts interpreted the *Constitution* by reference to the rules of international law now in force, they would be *amending* the *Constitution* in disregard of the direction in s 128 of the *Constitution*': at 592; and 'desirable as a Bill of Rights may be, it is not to be inserted into our *Constitution* by judicial decisions drawing on international instruments that are not even part of the law of this country': at 594.

115 See, eg, *Minister for Immigration, Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 where the Court held that 'it is the law of Australia which prevails in case of any conflict between it and the [*Refugee*] *Convention*. It is the law of Australia which must first be identified' and despite the ways in which 'the *Convention* may be used in construing the Act, it is the words of the Act which govern': at 14, 16. See also Maria O'Sullivan, 'Withdrawing Protection under Article 1C(5) of the 1951 Convention: Lessons from Australia' (2008) 20 *International Journal of Refugee Law* 586.

116 Susan Kneebone, 'What We Have Done with the Refugees Convention: The Australian Way' (2004) 22(2) *Law in Context* 83, 112. Note that reference to international law has also been a problem in another area of Australian law: see Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15 *Melbourne Journal of International Law* 228 where Wall concludes that 'the Court's approach to the interpretation of international law leaves much to be desired': at 250.

117 (2014) 254 CLR 28, 46.

political decision.[118] The Court held that although the Minister *could* consult with the UNHCR about the designation of PNG, he was not obliged to do so.[119]

In contrast, the inclusion of human rights provisions and an expansive list of international law considerations within the *PNG Constitution* has allowed its Supreme Court to consider whether detention of asylum seekers is reasonably justifiable in light of the rights and dignity of mankind.

IV WHAT NOW?: CLOSING THE CENTRE AFTER THE PNG SUPREME COURT DECISION IN *NAMAH*

The decision of the Supreme Court leaves Australia and PNG at an impasse. Australia remains determined to deny the asylum seekers access to Australian territory with the Australian Minister for Immigration and Border Protection stating that asylum seekers on Manus, even those recognised as refugees, will be expected to 'transition into PNG or return to their country of origin'.[120]

A person who is found not to be a refugee,[121] and who would not be subject to torture,[122] death, or cruel, inhuman, degrading treatment or punishment[123] if returned to his home country may be repatriated lawfully from PNG. However, refugees and individuals owed a *non-refoulement* obligation under international

118 Ibid.

119 Ibid 47. In relation to s 198AB(3) of the *Migration Act*, it held:

> What para (b) does not say is that the Minister is obliged to take any matter, other than those identified in para (a), into account. Thus, the Minister could, and did, consult with the UNHCR about designating PNG, but he was not obliged to do so. A failure to consider the matters said by the plaintiff to be relevant cannot spell invalidity.

The High Court also noted that 'the conditions for which the plaintiff contends cannot be implied on the basis of any assumptions respecting the fulfilment by Australia of its international obligations'.

120 Peter Dutton, 'Manus Regional Processing Centre' (Media Release, 17 August 2016) <http://www.minister.border.gov.au/peterdutton/Pages/MANUS-REGIONAL-PROCESSING-CENTRE.aspx>; see also Nicole Hasham, 'Manus Detention Centre: PNG Announces Australia Agreed to Close the Centre', *The Sydney Morning Herald* (online), 17 August 2016 <http://www.smh.com.au/federal-politics/political-news/peter-dutton-and-peter-oneill-confirm-pngs-manus-detention-centre-will-close-20160817-gquue5.html>.

121 That is, does not meet the definition of refugee under art 1A of the *Refugee Convention*. It should also be noted that

> a person is a refugee within the meaning of the 1951 *Convention* as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* HCR/1P/4/ENG/Rev. 3 (December 2011) 9 [28].

122 Article 3 of the *CAT* prohibits *refoulement* to torture.

123 Within the meaning of arts 6 and 7 of the *ICCPR*. In General Comment No 31, the Human Rights Committee expressed the view that parties to the *ICCPR* shall not remove a person to another country 'where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7': Human Rights Committee, *General Comment No 31 [80]: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [12].

human rights instruments cannot be returned.[124] A 'durable solution' must therefore be found for the men who cannot be sent home but can no longer be detained indefinitely in PNG.[125]

There are two options for the 'transitioning' of the refugees in Manus: the opening of the centre or the resettlement of the refugees in PNG. Alternatively, if Australia remains adamant about denying refugees access to Australia, it may attempt to resettle refugees in a third country. These possibilities will be considered in turn below.

A *Is Opening the Gates to the Centre a Politically Feasible and Legal Solution?*

Following the decision of the Supreme Court in *Namah*, it was reported that the men held in the detention centre were permitted to catch one of three buses into the main town in the mornings if they sign an agreement absolving the authorities of any responsibility for their safety. In addition, those who had been found to be refugees were permitted to work (although only three men were working as of May 2016).[126] There are, however, severe restrictions on the movement of refugees and asylum seekers on Manus Island under the new arrangements. They are not permitted to walk out of the base which is on a military compound or to leave the island, they must return to the centre overnight, and asylum seekers and those recognised to be refugees are not permitted to intermingle. The men remain separated inside the centre and must show identification even when going from one part of the centre to another.[127] The new arrangements are similar to those adopted on Nauru where a select number of individuals transferred to Nauru by Australia are permitted to leave the detention centre on Nauru from designated exit points, at specified times and days.[128]

The PNG government argues that the new arrangements satisfy the court ruling in *Namah*. It is unlikely, however, that a court will find the new arrangements

124 There are grave concerns that status determination procedures in PNG may be inadequate in identifying individuals with protection needs. The procedures do not, for example, include any attempt to identify individuals who may be owed 'complementary protection' under international law: Madeline Gleeson, 'Factsheet: Refugee Status Determination on Manus Island, Papua New Guinea' (Factsheet, Andrew and Renata Kaldor Centre for International Refugee Law, May 2016) 4 <http://www.kaldorcentre.unsw.edu.au/sites/default/files/factsheet_offshore_processing_rsd_manus.pdf>.

125 UNHCR has consistently emphasised the need for states to find durable solutions for refugees. See UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (May 2003) <http://www.refworld.org/docid/4124b6a04.html>; UNHCR, *Finding Durable Solutions: UNHCR Global Appeal 2014–2015* (2013) <http://www.unhcr.org/publications/fundraising/528a0a13b/unhcr-global-appeal-2014-2015-finding-durable-solutions.html>.

126 Tlozek, 'Manus Island: Asylum Seekers and Refugees No Longer in Detention, PNG Authorities Say', above n 15.

127 Ibid.

128 Peter Dutton, 'Australia Welcomes Nauru Open Centre' (Media Release, 5 October 2015) <http://www.minister.border.gov.au/peterdutton/2015/Pages/australia-welcomes-nauru-open-centre.aspx>. See also Dastyari, 'Detention of Australia's Asylum Seekers in Nauru', above n 17.

satisfactory.[129] As noted above, s 42 of the *PNG Constitution* bears striking similarity to art 5 of the *ECHR*, on which it is based. While the new arrangements in PNG have not been tested by the PNG Supreme Court, the fact that s 42 of the *PNG Constitution* is based on art 5 of the *ECHR* allows for an examination of the European jurisprudence on the meaning of 'liberty' under art 5 of the *ECHR*. The jurisprudence of the European Court of Human Rights is likely to be particularly helpful in the PNG context given the propensity of the PNG Supreme Court to consider foreign jurisprudence on matters concerning human rights.

The European Court of Human Rights has found that the question of whether or not an individual is deprived of his or her liberty is a question of the 'degree or intensity … not … nature or substance' of the restrictions.[130] That is, it is the cumulative impact of the restrictions that must be considered in determining whether or not an individual is detained. The Court has found that a person does not need to be in prison for there to be a violation of that person's liberty, and that deprivation of liberty can constitute 'numerous other forms'.[131] An arrangement can be a deprivation of liberty for the purposes of art 5 of the *ECHR* (and therefore presumably also under s 42 of the *PNG Constitution*) if 'cumulatively and in combination … restrictions on an individual … resembles detention in an "open prison" or committal to a disciplinary unit'.[132]

For example, in determining whether restrictions on the movement of asylum seekers in a French airport transit zone and a hotel constituted detention in *Amuur v France*,[133] the European Court of Human Rights found that:

> In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5 [of the *ECHR*], the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the *type, duration, effects and manner of implementation of the measure* in question. *The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.*[134]

As a result, the European Court of Human Rights found that asylum seekers had been deprived of their liberty within the meaning of art 5 of the *ECHR* at an airport's transit zone and the Hotel Arcade for twenty days.[135]

The situation of individuals transferred to PNG by Australia for processing and detention is one of severe control and restriction. Not only are asylum seekers not permitted to walk out of the centre and are denied the opportunity to move

129 Azadeh Dastyari has argued elsewhere that the open centre arrangements in Nauru continue to constitute detention despite the fact that asylum seekers in that island are now permitted to leave the detention facility under certain conditions. The same arguments apply in the PNG situation but even more so given the even more restrictive constraints on the transferee population in PNG. See Dastyari, 'Detention of Australia's Asylum Seekers in Nauru', above n 17.

130 *Amuur v France* (1996) 22 EHRR 533, 556 [42]. See also *Guzzardi v Italy* (1981) 3 EHRR 333.

131 *Guzzardi v Italy* (1981) 3 EHRR 333, 363 [95].

132 Ibid.

133 (1996) 22 EHRR 533.

134 Ibid 556 [42] (emphasis added).

135 For further discussion of this case see Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantanamo Bay*, above n 16, 182–3.

freely even within the centre itself, but those who choose to leave the centre by bus risk grave danger, as evidenced by the need to have them sign an agreement regarding their safety. In fact, the dangers faced by asylum seekers and refugees outside the detention facility have been well documented.[136] Some individuals whose refugee status has been recognised and who had been released into the broader PNG population have requested to be returned to the centre because of the risk to their safety.[137] Refugees released into the community have been subject to violence and many fear going into the community.[138] The degree and intensity of the deprivation of liberty faced by asylum seekers and refugees on Manus Island is thus severe and would almost certainly constitute deprivation of liberty for the purposes of the *PNG Constitution*.

In terms of further legal challenges, it could also be argued that any such restrictions are contrary to the wide-ranging 'right to freedom' provision in s 32 of the *PNG Constitution*.[139] In applying this, the Court would be able to consider companion provisions in the *PNG Constitution* discussed above (ss 38 and 39). Further, it may consider s 41, which permits it to determine whether any

136 See, eg, Radio New Zealand, 'Advocate Says Curfew Shows Danger for PNG Refugees', *Dateline Pacific*, 9 June 2015 (Ian Rintoul) <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201757576/advocate-says-curfew-shows-danger-for-png-refugees>; David Fedele, 'Resettling Refugees in Papua New Guinea: A Tragic Theatre of the Absurd', *The Guardian* (online), 20 May 2016 <http://www.theguardian.com/commentisfree/2016/may/20/resettling-refugees-in-papua-new-guinea-a-tragic-theatre-of-the-absurd?CMP=soc_568>.

137 Eric Tlozek, 'Refugee Tries to Return to Detention on Manus Island after Resettlement in Lae', *ABC News* (online), 31 March 2016 <http://www.abc.net.au/news/2016-03-31/refugee-returned-to-manus-island-after-being-resettled/7286358>; Ben Doherty and Helen Davidson, 'Manus Detainees Told They Will Be Separated, Then Resettled or Repatriated', *The Guardian* (online), 29 March 2016 <http://www.theguardian.com/australia-news/2016/mar/29/manus-detainees-told-they-will-be-separated-and-resettled-or-repatriated>. See also Ben Doherty and Helen Davidson, 'Manus Island Detainees Plead: Anywhere but Papua New Guinea', *The Guardian* (online), 18 April 2016 <http://www.theguardian.com/australia-news/2016/apr/18/manus-island-detainees-plead-anywhere-but-papua-new-guinea>.

138 Tlozek, 'Manus Island: Asylum Seekers and Refugees No Longer in Detention, PNG Authorities Say', above n 15.

139 *PNG Constitution* s 32:

> (1) Freedom based on law consists in the least amount of restriction on the activities of individuals that is consistent with the maintenance and development of Papua New Guinea and of society in accordance with this *Constitution* and, in particular, with the National Goals and Directive Principles and the Basic Social Obligations.
>
> (2) Every person has the right to freedom based on law, and accordingly has a legal right to do anything that— (*a*) does not injure or interfere with the rights and freedoms of others; and (*b*) is not prohibited by law, and no person— (*c*) is obliged to do anything that is not required by law; and (*d*) may be prevented from doing anything that complies with the provisions of paragraphs (a) and (b).
>
> (3) This section is not intended to reflect on the extra-legal existence, nature or effect of social, civic, family or religious obligations, or other obligations of an extra-legal nature, or to prevent such obligations being given effect to by law.

Discussed in *Namah* [2016] Papua New Guinea Supreme Court 13, 33 [115].

restriction is disproportionate, harsh, or oppressive.[140] As discussed above,[141] the *Namah* judgment indicates that the *conditions* in which people reside are part of the considerations used to assess whether there is any unlawful restriction of the human rights or constitutional rights of asylum seekers (in addition to any finding as to whether they are 'detained').

It should also be noted that simply opening the gates to the detention centre is not only legally problematic, but is also unlikely to resolve the PNG Prime Minister's earlier concerns that people transferred to PNG by Australia could not remain on Manus Island forever and that PNG could not afford to resettle all refugees. Manus Island MP Ron Knight has voiced concerns regarding the social impact of asylum seekers and refugees being released into Manus Island and the ability of the police, who he labels as 'weak', to maintain the peace.[142] For all the aforementioned reasons, the opening of the gates is not a sustainable long-term solution for refugees and asylum seekers transferred by Australia to PNG.[143]

B *Is the Resettlement of Refugees in PNG or a Third State a Viable Option?*

Another option available to PNG and Australia is to attempt the resettlement of refugees from the detention facility in either PNG or a third country. However, the resettlement of the refugees in PNG is not a durable solution and their resettlement in a third country may not be feasible.

As noted above, there are significant social and political problems in PNG which make resettlement of refugees transferred by Australia to PNG problematic. When a person is recognised as a refugee by an asylum host state under national procedures, the state is obliged to grant them certain rights under arts 2–34 of the *Refugee Convention* in addition to the primary obligation of *non-refoulement* under art 33. These 'acquired rights' provide additional protections to a refugee who has an identity and status under international law as a rights holder. As it is not known, at this stage, what form any resettlement of the men in PNG may take

140 *PNG Constitution* s 41:

> (1) Notwithstanding anything to the contrary in any other provision of any law, any act that is done under a valid law but in the particular case— (*a*) is harsh or oppressive; or (*b*) is not warranted by, or is disproportionate to, the requirements of the particular circumstances or of the particular case; or (*c*) is otherwise not, in the particular circumstances, reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind, is an unlawful act.
> (2) The burden of showing that Subsection (1)(a), (b) or (c) applies in respect of an act is on the party alleging it, and may be discharged on the balance of probabilities.
> (3) Nothing in this section affects the operation of any other law under which an act may be held to be unlawful or invalid.

141 See pt III B.

142 Nicole Hasham, 'Lucky They Are Not 'Chopped Up': Fears of Rising Violence on Manus Island as Asylum Seekers Are Released', *The Sydney Morning Herald* (online), 12 May 2016 <http://www.smh.com.au/federal-politics/political-news/lucky-they-are-not-chopped-up-fears-of-rising-violence-on-manus-island-as-asylum-seekers-are-released-20160512-got9cx.html#ixzz48ho3Dfus>.

143 On the problematic nature of resettling refugees in PNG see Fedele, above n 136.

and what rights the men may be given, an analysis of any resettlement program for the refugees transferred to PNG by Australia is not possible.[144] However, it is important to note that PNG has reservations with respect to the provisions contained in arts 17(1) (favourable treatment with regard to the right to engage in wage-earning employment), 21 (housing), 22(1) (elementary education), 26 (freedom of movement), 31 (penalties for illegal entry or presence), 32 (protection from expulsion), and 34 (facilitation of naturalisation).[145] These reservations make it highly likely that the refugees transferred by Australia will not be provided with rights that they would enjoy in a country such as Australia, which has not made similar reservations.

If PNG has reservations to some important rights, it is arguable that asylum seekers transferred there by Australia will not have some of the rights which Australia is bound to accord refugees. Australian jurisprudence has not directly adjudicated upon the legal implications of transferring a refugee to a country which has reservations to the *Refugee Convention*. However, Foster argues that

> a good faith application of *Convention* obligations requires that, in order to transfer a refugee to another state in accordance with the *Refugee Convention*, a state is under an obligation to ensure that the refugee will enjoy the rights to which she is entitled under the *Convention* scheme. This includes all *Convention* rights to which she is entitled at the time of transfer. In addition, '[h]e or she must also acquire in the receiving state such additional rights as are mandated by the requirements of the *Convention*.'[146]

The need for a common set of refugee rights to be in place in transfer situations is also recognised by the complex harmonisation standards required for countries participating in the European *Dublin Convention* transfer arrangement.[147]

144 At the time of writing, less than 20 refugees had voluntarily resettled in PNG: Tom Mcllroy, 'Fewer than 20 Asylum Seekers Voluntarily Resettled in Papua New Guinea: Peter Dutton', *The Sydney Morning Herald* (online), 18 August 2016 <http://www.smh.com.au/federal-politics/political-news/fewer-than-20-asylum-seekers-voluntarily-resettled-in-papua-new-guinea-peter-dutton-20160817-gqv609.html?mc_cid=b703adf2cf&mc_eid=1e224c1a42>. However, there is little publically available information regarding the resettled refugees including any information on the conditions of their resettlement. It is also not known if the conditions for resettled refugees will remain the same if a much larger group were to be resettled in the country.

145 See UNHCR, *Reservations and Declarations to the 1951 Refugee Convention* (2016) <http://www.unhcr.org/protection/convention/3d9abe177/reservations-declarations-1951-refugee-convention.html>.

146 Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223, 270 (citations omitted). See also James C Hathaway, 'The Michigan Guidelines on Protection Elsewhere, Adopted January 3, 2007' (2007) 28 *Michigan Journal of International Law* 207.

147 *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities*, signed 15 June 1990, OJ C 254 (entered into force 1 September 1990) ('*Dublin Convention*'). See discussion of the EU system in Kris Pollet, 'Accessing Fair and Efficient Asylum Procedures in the EU: Legal Safeguards and Loopholes in the Common European Asylum System' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing, 2017) (forthcoming).

The acquired rights in the *Refugee Convention* also recognise the need for refugees to have a level of personal security, dignity and stability.[148] As noted above, there are problems with human rights and general conditions in PNG for refugees transferred to PNG by Australia. Further, there is extreme reluctance on the part of many refugees on Manus Island to accept resettlement there.[149] The resettlement of gay refugees in PNG is particularly problematic because of the criminalisation of consensual same-sex relations between men.[150] As reported by Stewart, gay men in PNG 'must endure discrimination and abuse everywhere' including being open to blackmail, police brutality, and homelessness.[151]

It may therefore transpire that the authorities cannot in fact resettle refugees in PNG and may need to look for a third country for their resettlement. However, any attempt at finding a third country for resettlement of refugees from Australia's extraterritorial processing centres is uncertain or has not succeeded thus far. This has included a failed attempt to transfer refugees from Nauru to Cambodia.[152] An offer from New Zealand to resettle 150 refugees from Australian-funded immigration detention facilities was rejected by the Australian government.[153] However, even if the offer had been accepted, the small number sought by New Zealand would not be sufficient to offer a durable solution to the more-than-400

148 See an in-depth discussion of acquired rights in James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005). See also Maria O'Sullivan, 'Identifying Asylum-Seekers as Potential Refugees: Transfers and "Acquired Rights" under the Refugee Convention' in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, 2014) 122.

149 Ben Doherty and Helen Davidson, 'Manus Island Detainees Plead: Anywhere but Papua New Guinea', above n 137. We note that resettlement is not understood to be an act which can be forced upon refugees by compulsion and should remain voluntary. If the refugees do not want to resettle in PNG, they should not be compelled to do so.

150 Section 210 of the *Criminal Code Act 1974* (Papua New Guinea) provides for the offence of sexual penetration against the order of nature (imprisonment of up to 14 years). Section 212 provides for the offence of gross indecency between males (imprisonment for up to 3 years).

151 Christine Stewart, *Name, Shame and Blame: Criminalising Consensual Sex in Papua New Guinea* (ANU Press, 2014) 2.

152 Australia and Cambodia signed the *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees in Cambodia* (Intergovernmental Agreement, 26 September 2014) and *Operational Guidelines for the Implementation of the Memorandum of Understanding on Settlement of Refugees in Cambodia* (Intergovernmental Agreement, 26 September 2014) to facilitate the voluntary resettlement of refugees from Nauru to Cambodia at a cost of $55.5 million to the Australian government. By May 2016, Australia had only succeeded in resettling five refugees in Cambodia with only two remaining in the country. In April 2016, Phay Siphan, a spokesperson for Cambodia, admitted that the resettlement arrangements were a failure because Cambodia was not in a position to support the refugees transferred by Australia: Lindsay Murdoch and Michael Koziol, 'Australia's Cambodia Refugee Resettlement Plan 'a Failure'', *The Sydney Morning Herald* (online), 23 April 2016 <http://www.smh.com.au/world/australias-cambodia-refugee-resettlement-plan-a-failure-20160403-gnx3jv.html>. See also Monique Failla, 'Outsourcing Obligations to Developing Nations: Australia's Refugee Resettlement Agreement with Cambodia' (2016) 42 *Monash University Law Review* (forthcoming).

153 Helen Davidson, 'Turnbull Rejects New Zealand Offer to Take 150 Refugees from Detention', *The Guardian* (online), 29 April 2016 <https://www.theguardian.com/australia-news/2016/apr/29/turnbull-rejects-new-zealand-offer-to-take-150-refugees-from-detention>.

men who had been recognised as refugees and who were estimated to be in need of resettlement from PNG alone at that time.[154]

In November 2016, the Australian Prime Minister announced that certain refugees from Australia's extraterritorial processing facilities in Nauru and Manus Island would have the opportunity to be resettled in the United States in a one-off resettlement arrangement.[155] However, at the time of writing, in December 2016, there remained great uncertainty regarding the deal, including the number of refugees the United States would accept, how they would be selected, and what would happen to those who were not chosen. Furthermore, there were significant questions regarding the viability of the deal with the United States, with experts warning that the resettlement arrangements may be rejected by Donald Trump when he took office as President.[156] Given the lack of information regarding the deal at the time of writing and doubts regarding its future, an analysis of the arrangement is beyond the scope of this paper.

In any event, as a one-off arrangement, the United States deal does not represent a long-term, enduring solution. Rather, the focus should be brought back to cooperation in our region. In this regard, it could be said that Australia may have had more success in resettling refugees in the region if there existed a functioning regional protection network. Australia has taken a strong leadership role in forming a 'Regional Cooperation Framework'[157] in refugee and immigration matters as part of its role as co-chair of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime ('Bali Process').[158] Interestingly, this framework reflects principles of burden sharing and collective responsibility for asylum within the region and emphasises the need for 'durable solutions' for

154 Eric Tlozek, 'PNG Government Says Refugee Assessments on Manus Island Have Been Completed', *ABC News* (online), 7 April 2016 <http://www.abc.net.au/news/2016-04-07/png-deems-under-half-of-manus-island-detainees-refugees/7308322>.

155 Paul Karp, 'Australia's Deal to Resettle Refugees in the US: What We Know So Far', *The Guardian* (online), 13 November 2016 <https://www.theguardian.com/australia-news/2016/nov/13/australias-deal-to-resettle-refugees-in-the-us-what-we-know-so>. The US Secretary of State, John Kerry, confirmed this by stating that 'the United States have agreed to consider referrals from UNHCR on refugees now residing in Nauru and in Papua New Guinea': US Department of State, *Press Availability with New Zealand Prime Minister John Key* (13 November 2016) <http://www.state.gov/secretary/remarks/2016/11/264266.htm>.

156 Paul Karp, 'Australia's Refugee Deal May Be Scuppered by Trump, US Expert Warns', *The Guardian* (online), 15 November 2016 <https://www.theguardian.com/australia-news/2016/nov/15/trump-tear-up-australia-refugee-deal-us-expert-warns>.

157 This is a non-binding initiative of the Bali Process. For a list of its aims and core principles see Bali Process, *Regional Support Office* <http://www.baliprocess.net/regional-cooperation-framework>.

158 The Bali Process, co-chaired by Indonesia and Australia, has more than 48 members, including the UNHCR, the International Organization for Migration (IOM) and the United Nations Office of Drugs and Crime (UNODC): see *The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* <http://www.baliprocess.net>. It has a strong focus on prevention of irregular migration and people smuggling. In a compelling critique of the Bali Process, Susan Kneebone argues that it reflects 'a hierarchical agenda-setting process or "steering mode"' which can be contrasted to other models of mechanisms in the Asia Pacific Region: see Susan Kneebone, 'The Bali Process and Global Refugee Policy in the Asia-Pacific Region' (2014) 27 *Journal of Refugee Studies* 596, 596. Australia's hierarchical role in the Asia-Pacific is also reflected in its response to the PNG Government's decision to close the Manus centre to comply with the orders of the Supreme Court in *Namah*, discussed above.

refugees. In this light, the attempt by Australia to 'regionalise' refugee protection via the drafting of bilateral agreements with developing countries is problematic because it is questionable whether Australia's actions are truly 'burden sharing' or, instead, 'responsibility-shifting'. The failure of Australia's approach with regard to the Bali Process and other attempts to find resettlement countries for its refugees is evident in the fact that now, more than 15 years after the first incarnation of the Pacific Solution, this regional protection regime is no closer to being established.

The need for greater regional cooperation was also identified by the expert panel who in 2012 recommended the re-opening of extraterritorial detention and processing facilities in Manus and Nauru. The panel believed extraterritorial detention facilities should act as a 'circuit breaker' to deter boat arrivals. Importantly, it also recommended a large increase to Australia's humanitarian intake from the region, and building capacity in countries such as Malaysia, Indonesia, and Thailand to improve conditions for asylum seekers and refugees. The panel stressed the importance of not 'cherry picking' from its recommendations.[159] As one of the members of the expert panel, Paris Aristotle, laments, in the almost four years since the panel's recommendations and the re-opening of extraterritorial detention facilities by Australia, 'no progress has been made on a coherent regional framework that would provide the architecture to manage this issue co-operatively'.[160]

Thus, an offshore processing regime which relies on an as yet non-existent regional framework is unsustainable and unworkable. The fact that there are a significant number of recognised refugees in limbo on both Nauru and PNG is significant for both Australia's international legal obligations as well as the rationale of its domestic policy. The *Refugee Convention* does not foresee countries indefinitely 'warehousing' refugees, that is, keeping them in limbo without a durable solution of protection. Arguably, neither does the 'no advantage' principle recommended by the 2012 Expert Panel report.[161] Although this introduced the 'no advantage' principle which underpins the current offshore system, the first recommendation of that report underlined the need for the achievement of durable solutions, recommending '[t]he facilitation of a regional cooperation and protection framework that is consistent in the processing of asylum claims, the provision of

159 Expert Panel on Asylum Seekers, above n 43, 8.

160 Paris Aristotle, quoted in Michael Gordon, 'Asylum Seekers — Is There a Better Way?', *The Age* (online), 30 January 2016 <http://www.theage.com.au/federal-politics/political-news/saturday-feature-asylum-seekers--is-there-a-better-way-20160126-gme9fb.html#ixzz49cVlg8a1>.

161 Commentators have also noted that the Expert Panel report did not intend to legitimise the warehousing of refugees in limbo. See Frank Brennan speaking recently about the PNG situation, noting that the Expert Panel's 'No Advantage' principle which has informed government policy since 2012 was not meant to lead to such warehousing: Emma Alberici, Interview with Frank Brennan (*ABC Lateline*, 15 August 2016) <http://www.abc.net.au/lateline/content/2016/s4520153.htm>. In fact, Paris Aristotle, one of the authors of the Expert Panel report, has urged the Australian government to remove refugees and asylum seekers from Nauru and Manus Island quickly to avoid further self-harm: Michael Gordon, 'Act Now on Nauru and Manus or 'Many More' Will Attempt Self-Harm, Warns Paris Aristotle', *The Sydney Morning Herald* (online), 2 September 2016 <http://www.smh.com.au/federal-politics/political-news/act-now-on-nauru-and-manus-or-many-more-will-attempt-selfharm-warns-paris-aristotle-20160902-gr7idy.html>.

assistance while those claims are being assessed and the achievement of durable outcomes'.[162]

V CONCLUSION

The creation of a sustainable and legal regional protection framework in the Asia-Pacific requires substantial foundation work across the region to ensure a level of harmonisation of standards prior to any transfers by Australia to third countries. Such regionalisation cannot be carried out simply by the signing of aid-tied bilateral agreements between wealthy industrialised nations and developing countries. The decision of the Supreme Court of Papua New Guinea in *Namah* demonstrates that, contrary to Australia's stance that the Manus centre is 'PNG's responsibility', the legal situation is far more complex and involves shared legal responsibility. The decision also provides significant evidence that Australia is neither politically nor legally able to simply 'outsource' its refugee protection obligations to PNG.

The implications of *Namah* are set to continue, with the decision likely to be followed by a number of other legal actions. An application for compensation for breach of the right to liberty by asylum seekers and refugees detained in Manus Island was brought before the PNG Supreme Court in 2016. According to media reports, the applicants sought three orders: that the Commonwealth of Australia be joined to the constitutional challenge to the transferees' detention, the release of all asylum seekers and refugees into the custody of Australia, and the return of all such persons to Australia. It also sought 'reasonable compensation' for those who have been illegally detained.[163] Although this application was dismissed by the PNG Supreme Court in October 2016 for technical reasons (a lack of signatures on the originating application), it appears that the detainees' legal representatives are planning further litigation on behalf of the detainees.[164] It is likely that the new arrangements of providing detainees with increased but limited freedom of movement will therefore be an important legal issue in this continuing litigation.

Regardless of the outcome of any further litigation, *Namah* demonstrates that extraterritorial processing in PNG is not a sustainable, long-term solution to refugee protection in the region. The Court has highlighted the problematic nature of the arrangements and the violations of the rights of asylum seekers and refugees. Its findings, in particular with regard to the human rights of individuals concerned, should be a warning to any jurisdiction wishing to emulate Australia's ill-considered arrangements. In light of regional, geopolitical, and legal realities,

162 Expert Panel on Asylum Seekers, above n 43, 14.

163 Ben Doherty and Helen Davidson, 'Manus Island Detainees Launch High Court Bid to Be Moved to Australia', *The Guardian* (online), 4 May 2016 <http://www.theguardian.com/australia-news/2016/may/04/manus-island-detainees-launch-high-court-bid-to-be-moved-to-australia>.

164 Eric Tlozek, 'Manus Island Asylum Seekers "Broken" after Supreme Court Dismisses Applications', *ABC News* (online), 28 October 2016 <http://www.abc.net.au/news/2016-10-28/manus-island-asylum-seekers-broken-after-court-decision/7974164>.

Australia's only viable option is to resettle refugees from PNG in Australia. Failure to do this will result in costly delays,[165] and an inability to offer refugees durable and effective protection from harm.

165 The detention centre on Manus Island has cost Australia approximately $2 billion between 2012–16. This is at the cost of more than $1 million for each of the 2000 people who have been detained there: Adam Gartell, 'Manus Island Bill $2 Billion and Counting — $1 Million for Each Detainee', *The Sydney Morning Herald* (online), 21 August 2016 <http://www.smh.com.au/federal-politics/political-news/manus-island-bill-2-billion-and-counting--1-million-for-each-detainee-20160820-gqx8do.html?mc_cid=b703adf2cf&mc_eid=1e224c1a42>.