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Outsourcing, Responsibility and Refugee Claim-Making in Australia's Offshore Detention Regime

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On 31 October 2017, the Australian-run Manus Island Regional Processing Centre (RPC), located at the Lombrum Naval Base in Papua New Guinea (PNG), officially closed its operations. At the time, 606 men still lived there. All of these men had been forcibly transferred by the Australian authorities from Australia to PNG and detained at the centre at some point during the preceding four years. Most of these men had subsequently been found to be refugees by the PNG immigration authorities. As part of the centre's closure, the PNG and Australian authorities insisted that the men either return to their state of origin (an unviable option for people recognised as having a 'well-founded' fear of persecution in their home state) or relocate to a new temporary accommodation facility – the then unfinished East Lorengau Refugee Transit Centre (RTC) – in the hope of being resettled in a third country. The fallacy of this 'choice' was exacerbated by a lack of available third-country resettlement options: either await the slim possibility of formal resettlement under a fledging and much-criticised arrangement with the United States or accept integration to the local PNG community which offered little prospects of employment or long-term livelihood. Instead, most men opted to remain inside the RPC after its closure and continue to protest the prolonged state of legal limbo and political abandonment that had been inflicted upon them. Organising collectively around the centre's closure, they publicly demanded that the Australian government recognise its political, legal and moral responsibility toward them. Materially, the centre's closure meant that the provision of essentials such as food, water and medical supplies to the men, who refused to leave the centre's grounds, effectively ceased. The decision to remain in the centre thus instigated three weeks of intense resistance within the RPC, characterised by state orchestrated starvation, creative self-reliance, organised protest and imminent terror. The prominent award-winning Kurdish journalist and filmmaker Behrouz Boochani, who himself had been detained as a refugee on Manus Island since July 2013 and who vividly chronicled the closing of the centre in his "Diary of a Disaster" published via *The Guardian*, outlined one mantra that united the men during this time: 'We will never retreat and leave this prison of hell. We will never move to another prison. We will never settle for anything less than freedom. Only freedom.'¹

¹ Behrouz Boochani, 'Manus Is a Landscape of Surreal Horror', *The Guardian* (2 November 2017).

In this chapter, I locate the struggles around the closure of the Manus Island RPC in the context of broader legal, political and economic contestations surrounding Australia's punitive offshore refugee detention regime in PNG. I argue that Australia's draconian policies of offshore processing have increasingly sought to place the economics of immigration detention outside of the realm of domestic political debate and to obfuscate the Australian state's obligations under international refugee law. These policies have done this through two key strategies of outsourcing and offshoring that have both, in different ways, devolved legal and practical responsibility for the management and processing of asylum seekers to private corporations and external state authorities. In the most recent iteration of Australia's offshore detention regime, this mix of external public and private actors has included two neighbouring island states (PNG and Nauru), transnational private companies (G4S, IHMS, Transfield, and Wilson Security) and non-governmental organisations (Salvation Army and Save the Children). However, as the events of October 2017 demonstrate, the Australian government's practices of exclusion and expulsion have been met with a series of mass refugee protests and practices of claim-making from the men held within the Manus Island RPC that instead insisted upon articulating relationships of political, legal and moral responsibility towards the authorities that exercise control over their lives and futures. One site where such forms of refugee claim-making have been articulated is in court litigation, both in Australia and PNG. I examine two recent legal challenges initiated by and on behalf of the affected refugees that have shaped the political struggle around the legality and legitimacy of Australia's regional offshore detention regime. At the time of writing, these series of legal litigations have not (yet) been successful in bringing about an end to Australia's offshore processing regime, and the plights and protests of the asylum seekers and refugees who are subjected to this violent and harmful regime remain ongoing.

Australia's Deterrence Paradigm: The Structural Violence of Outsourcing, the Diffusion of Responsibility

Australia has maintained a policy of mandatorily detaining asylum seekers who arrive in its territory unauthorised by boat—that is, without a valid visa—since 1992. Initially adopted in response to increasing unauthorised boat arrivals of Indochinese asylum seekers from the late 1980s onwards, this mandatory detention policy has become a central pillar of Australia's increasingly draconian approach towards asylum seekers. At the time of its introduction, the policy was justified as a temporary practice necessary to maintain the 'integrity' of Australia's migration program, drawing inspiration from state practices of asylum seeker deterrence and boat push-backs elsewhere.² Successive Australian governments have maintained this policy in the face of sustained criticism from both domestic civil society and international authorities. Internationally, the UN Human Rights Committee, for example, has repeatedly stated that the mandatory indefinite detention of certain asylum seekers and refugees amounts to systematic human rights breaches and was 'cumulatively inflicting

² Daniel Ghezelbash, *Asylum Lost* (CUP, 2018).

serious, irreversible psychological harm'.³ Domestically, political opposition to the legitimacy and viability of these centres has been expressed through, for instance, widespread detainee protests, including hunger strikes and riots within detention facilities, and accompanying mass civil society mobilisations in the early 2000s.⁴

The introduction of mandatory detention quickly gave rise to a complex institutional infrastructure of immigration detention centres, including in notoriously remote locations such as the Woomera Immigration Reception and Processing Centre (1999-2003) situated in the Australian central desert. Initially, these immigration detention centres were run by an agency within the Australian Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). A significant shift occurred in 1996, when the conservative government under Prime Minister John Howard announced its intention to engage private companies to manage the network of centres with the stated aim of 'deliver[ing] quality detention services with ongoing cost reduction'.⁵ In February 1998, the first contract for running Australia's then network of seven immigration detention centres was awarded to Australasian Correctional Services (ACS), an Australian-based company would eventually become a subsidiary of the multinational Group 4 Securicor (G4S).⁶ ACS ran the so-called 'Detention Services Contract' for six years at a cost of over half a billion Australian dollars.⁷ Despite this huge expenditure, the number of people travelling to Australia unauthorised by boat during the first decade of mandatory detention remained relatively low compared to global asylum trends.⁸

Australia was among the first states to fully privatise the running of immigration detention centres, following earlier moves to outsource certain immigration detention functions in the UK and US.⁹ Like elsewhere, the privatisation of Australia's immigration detention network has had two key effects: first, that public funds have been used to generate increasing profits for private companies, and second, the formal devolution and diffusion of practical and legal responsibility, whereby the private contractor – and not the state – holds primary responsibility for 'delivering' certain 'services' to asylum seekers.¹⁰ Importantly, the use of private companies to run immigration detention centres has not resulted in reduced

³ *FKAG v Australia*, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) and *MMM v Australia*, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013).

⁴ See Lucy Fiske, *Human Rights, Refugee Protest and Immigration Detention* (Palgrave, 2016).

⁵ ANAO, *Management of the Detention Centres Contracts (Part A). 2003-04* (Audit Report, 2004) 13.

⁶ While the Australian government contract was with ACS, the detention centres were run through its operational subsidiary Australasian Correctional Management (ACM). At the time, ACS was a subsidiary of the American-based company Wackenhut Corrections Services (WCC). The initial contract was for three years, with a possibility of extension.

⁷ ANAO, *Management of the Detention Centres Contracts (Part A). 2003-04* (Audit Report, 2004) 12. In 2003, DIMIA entered into a three year detention services contract with a new provider, GSL, valued at \$100 million per year. ANAO, *Management of the Detention Centres Contracts (Part B)* (Report, 2005) 18.

⁸ Government statistics indicate that, in 1995-96, there were only 693 people in immigration detention, although this number would rise significantly to peak at 9,321 people (including 1224 children) in immigration detention in 2001-02. Janet Phillips and Harriet Spinks, *Immigration detention in Australia* (Department of Parliamentary Services Background Note, March 2013).

⁹ Michael Flynn and Cecilia Cannon, *The Privatization of Immigration Detention: Towards a Global View* (A Global Detention Project Working Paper, September 2009).

¹⁰ Michael Welch, 'Economic Man and Diffused Sovereignty: A Critique of Australia's Asylum Regime' (2014) 61(1) *Crime, Law and Social Change* 81, 88.

government bureaucracy, the provision of quality care to asylum seekers nor the complete evasion of legal liability on the part of the Australian government. For example, a 2004 government review of the ACS contract found that the arrangement failed to define the nature, quality and level of services required of ACS and lacked sufficient mechanisms to allow DIMIA to monitor ACS conduct. It also noted that the division within DIMIA responsible for managing detention centre contracts exponentially grew from 15 staff in 1998 to 150 staff in 2004.¹¹ Similarly, despite the privatisation of services, Australian courts have held that the Australian government still retains a legal duty of care towards asylum seekers in detention to exercise reasonable care for their safety, a duty which cannot be contracted out to external providers.¹² Consequently, the Australian government paid out over AU\$5 million between 1999 and 2012 in compensation to former detainees who suffered physical injuries or psychological damage while in detention.¹³

More recently, successive Australian governments have further sought to externalise their responsibility towards asylum seekers and refugees through the implementation of a policy of so-called ‘offshore processing’. This policy of ‘offshore processing’ has had two distinct phrases: the Pacific Solution Mark I (2001 – 2008 implemented under the Coalition government led by Prime Minister Howard) and the Pacific Solution Mark II (2012 – ongoing, first implemented under the Gillard Labor government and maintained under the subsequent Coalition governments).¹⁴ Notably, when the newly-elected Rudd Labor government announced the end of the first Pacific Solution in 2007, the Immigration Minister denounced the policy of offshore processing as a ‘cynical, costly and ultimately unsuccessful exercise’.¹⁵ In the previous seven years of implementing offshore detention and processing, the Australian government had contracted the International Organization for Migration to administer the detention facilities on Manus Island and Nauru – at an estimated total cost of \$289 million – while the Australian immigration authorities conducted refugee status determinations.

The reintroduction of Australia’s offshore detention regime in August 2012 has signalled a new phrase in Australia’s approach to asylum seeker deterrence that instrumentalises humanitarian concerns about migrant deaths to further practices of border securitisation. Justified under the rhetoric of ‘saving lives at sea’ following an increase in migrant drownings alongside the rise in unauthorised arrivals in previous years,¹⁶ the reestablishment

¹¹ ANAO, *Management of the Detention Centres Contracts (Part A). 2003-04* (Audit Report, 2004) 23-4.

¹² See eg *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36; *AS v Minister for Immigration and Border Protection* [2014] VSC 593.

¹³ This number is much higher for compensation claims concerning unlawful detention, amounting to over \$18 million for the same period. See Department of Finance and Deregulation, Australian Government, *Compensation claims made by immigration detainees between 1999 and 2011* (FOI Request, 2012). It is difficult to ascertain the precise details of these cases as most successful compensation cases have been settled out of court.

¹⁴ For an overview of these two distinct phases, see Anthea Vogl, ‘Sovereign Relations: Australia’s ‘Off-shoring’ of Asylum Seekers on Nauru in Historical Perspective’ in Charlotte Epstein (ed), *Norming the World: Postcolonial Perspectives on the Use of Norms in International Relations* (Routledge, 2017) 158.

¹⁵ Paul Maley, ‘Pacific Solution Sinks Quietly’, *The Australian* (9 February 2008), <http://www.theaustralian.com.au/archive/news/pacific-solution-sinks-quietly/news-story/507ebc9ecc06316fe3eb131a9333583a?sv=1d6c4928265abd42219ab312c0635bc6>

¹⁶ *Expert Panel on Asylum Seekers* (2012) 9.

of offshore processing was soon accompanied by a military-led campaign to turn-back asylum seeker boat at sea, and a political pledge to never allow asylum seekers arriving unauthorised by boat to settle in or even visit Australia.¹⁷ As Michael Grewcock argues, central to Australia's draconian deterrence model is a 'conceptual approach to refugees that deprives them of agency and vests legitimacy only in those willing to comply with border controls'.¹⁸

Regionally, the revamped offshore detention regime was implemented through a series of agreements with two small Pacific Island neighbouring states to Australia's north and several private contractors willing to provide a range of services such as those classified as 'garrison', welfare and health in the newly re-established RPCs. In mid-2012, the Australian government concluded two Memorandums of Understanding, one with PNG and the other with Nauru, for the transfer and detention of asylum seekers from Australia.¹⁹ Under both MoUs, the Australian government bears all the costs incurred for implementing regional detention and processing (including construction and operation costs), while the PNG and Nauruan governments are responsible for instituting the refugee status determination process in accordance with their respective domestic law. Australian officials often cite this jurisdictional arrangement as a way of seeking to deflect legal responsibility for the predicament of the people subject to its offshore detention regime, from uncertainty surrounding their future resettlement to the conditions they face in detention.²⁰ In exchange, Australia significantly increased its aid to both states, including funding major infrastructure projects.

While the RPCs are officially 'operated' by the PNG and Nauruan governments, the Australian government has practical authority over the running and management of the RPCs via contracts with private companies and NGOs. Initially, the Australian government contracted G4S to manage Manus Island RPC, with welfare services provided by two globally-networked NGOs: The Salvation Army and Save the Children Australia. From mid-2014 to October 2017, this lucrative contract was awarded to the Australian-listed company Transfield (known as Broadspectrum from November 2015), for a combined value of over

¹⁷ In July 2013, the Australia government under new Prime Minister Kevin Rudd announced that no asylum seeker or refugee subject to offshore processing would be resettled in Australia. In addition, since the election of the Coalition government in November 2013, Australia has adopted a policy of turning back asylum seeker boats at sea. While in clear breach of the fundamental international norm of non-refoulement, this practice has drastically reduced the number of people able to travel to the Australian mainland by boat to seek asylum. As a result, Australia has not transferred new arrivals to PNG or Manus Island since 2014. See Sara Dehm and Max Walden, 'Refugee Policy: A Cruel Bipartisanship' in Anika Gauja et al, *Double Disillusion: The 2016 Australian Federal Election* (ANU e-Press, 2018).

¹⁸ Michael Grewcock, "'Our Lives Is in Danger": Manus Island and the End of Asylum' (2017) 59(2) *Race & Class* 70, 75.

¹⁹ *Memorandum of Understanding between the Government of the Independent State of PNG and the Government of Australia, relating to the Transfer to and Assessment of Persons in PNG, and Related Issues* (September 2012), superseded by the *Memorandum of Understanding between the Government of the Independent State of PNG and the Government of Australia, relating to the Transfer to, and Assessment and Resettlement in, PNG of Certain Persons, and Related Issues* (July 2013).

²⁰ Nonetheless, under these arrangements, refugees and asylum seekers on Manus Island and Nauru may be temporarily brought back to Australia in certain circumstances such as for giving birth or specialised medical treatment.

AU\$3 billion.²¹ Under the terms of this contract, Transfield became responsible for the day-to-day operations of the RPCs including providing security, cleaning, catering, and individual welfare and health services. As a result, Transfield exercised practical and quasi-sovereign authority over the lives of the people living in RPCs, making ‘decisions about detainee welfare, placement, movement, communication, accommodation, food, clothing, water, security and environment on a daily basis’.²² A 2015 report authored by a group of Australian lawyers, researchers and human rights activists under the *No Business in Abuse* initiative held that, while the Australian authorities appear to ‘have ultimate authority for some decisions under the terms of the contracts, there can be no doubt that without Transfield and its subcontractors the operation of the ODCs would be impossible’.²³ At the peak of the transfers, in November 2013, the number of people detained in the Manus Island RPC reached 1,339 men. The following year, an Australian Senate report noted that conditions at the Manus Island RPC were ‘harsh, inadequate and inhumane’, including ‘cramped and overheated sleeping quarters, exposure to the weather, poor sanitation and sewage blockages, unhygienic meals and poorly managed service of meals’.²⁴

In recent years, the logic of border security has sat ambivalently alongside the global upsurge of discourses of state austerity and fiscal responsibility. The findings of the National Commission of Audit, established by the Australian Treasurer in 2013 with the purpose of examining the ‘scope and efficiency’ of government finances, present an illustrative example. While asserting that the Australian government’s faced a ‘substantial budgetary challenge’ and required a reduction in state spending, the Commission failed to question the legitimacy or underlying basis of expenditure on immigration detention per se. Although it recognised that Australia’s immigration detention regime was the ‘fastest growing’ government programme in recent years, the Commission merely recommended the renegotiation of contracts and ‘better targeting of services’ in order to reduce the cost of detaining people within both the onshore and offshore facilities, rather than a more radical overhaul of the contractual relationships or the costly policy of mandatory immigration detention and offshore processing.²⁵ Border security is thus presented as an economic and technocratic necessity that must be accepted and managed rather than eliminated, even by proponents of austerity.

²¹ ANAO, *Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services* (September 2016) 7. This figure is until March 2016. In reality, the contract between the Australian government and Transfield was a series of contracts, starting in 2012 for the running of the Nauru RPC, before signing another single contract to become the sole provider of garrison support and welfare services for both RPCs in October 2015. This contract was extended on two occasions, in February 2016 and August 2016.

²² *No Business in Abuse Report* (2015) 22.

²³ *No Business in Abuse Report* (2015) 22. See also Brynn O’Brien, ‘Extraterritorial Detention Contracting in Australia and the UN Guiding Principles on Business and Human Rights’ (2016) 1 *Business and Human Rights Journal* 333.

²⁴ Australian Senate, Legal and Constitutional Affairs Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (Report, December 2014), https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/manus_island/Report/c03.

²⁵ *Towards Responsible Government: The Report of the National Commission of Audit* (Commonwealth Government, February 2014) lviii.

In contrast, refugee sector advocates have sought to frame Australia's punitive policies of offshore detention within an economic cost-benefit framework as one means of delegitimising them. Since 2012, the cost of Australia's offshore detention regime has been a routine target of civil society criticism and media attention. For example, in September 2016, Save the Children and UNICEF Australia released a joint report, *At What Costs?*, that documented the human, economic and strategic costs of Australia's offshore processing regime, estimating that Australia spent at least AU\$9.6 billion (US\$7.3 billion) between 2013 and 2016 funding deterrence policies including boat turn-backs, offshore processing, and mandatory immigration detention.²⁶ Paradoxically, this criticism was articulated by one of the very NGOs previously contracted by the Australian government to provide 'welfare services' to asylum seekers on Nauru between 2013 and 2015.²⁷

In making the case for a less punitive policy approach, civil society efforts have also drawn attention to the economic benefits and contributions that refugee communities do and could further make, if Australia abandoned its policy of mandatory and offshore processing and allowed asylum seekers and refugees greater labour market participation and community integration. One risk with this campaign strategy is that hospitality becomes connected to economic motivations, and the validity of a person's presence in a host country linked to the size of their economic contributions—thus imposing additional standards onto asylum seekers and refugees that not all are able to, or want to, meet. This shift in public debate from legal to economic arguments has also been championed and exploited by successive Australian governments as a way of delegitimising the claims of refugees and justifying the increasingly draconian and exclusionary approach towards asylum seekers. For example, successive Australian governments have depicted asylum seekers travelling to Australia unauthorised by boat as profit-seeking actors, rather than rights-claiming individuals.²⁸ In such contestations over the economics of asylum, asylum seekers only figure in a binary framework: either as deserving individuals that generate profit for and benefit the Australian state and community, or as underserving individuals who seek to exploit and extract from it.

#SOSManus: Refugee Protests, Court Litigation and Articulating Relations of Responsibility

²⁶ Save the Children and UNICEF, *At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the Alternatives* (Report, September 2016)

<http://www.unicef.org.au/Upload/UNICEF/Media/Documents/At-What-Cost-Report.pdf>. See also similar report by Amnesty International in same year: Amnesty International, *Islands of Despair: Australia's "Processing" of Refugees on Nauru* (Report, October 2016), <https://www.amnesty.org.au/wp-content/uploads/2016/10/ISLAND-OF-DESPAIR-FINAL.pdf>

²⁷ Save the Children's initial one year contract awarded in 2013 was valued at approximately AU\$30 million. Save the Children's contract was not renewed after it expired on 31 October 2015 and Transfield (now Broadpectrum) took over the contractual responsibility for providing 'welfare services' to refugees and asylum seekers on Nauru.

²⁸ See, eg, Ministerial comments about Sri Lankan asylum seekers as 'economic migrants' or 'wealthy' Iranian 'economic refugees': <https://www.theguardian.com/world/2013/jun/28/rudd-government-asylum-seeker-policy>; <https://www.theguardian.com/australia-news/2017/sep/28/peter-dutton-lets-fly-at-armani-clad-economic-refugees-sent-to-us>

The global proliferation of neoliberal policies from the 1990s onwards has not led to a reduction in punitive or disciplinary state functions.²⁹ While neoliberalism purports to create a liberalised economy and self-regulating market, it in fact rests upon practices of criminalisation, confinement and risk-dissemination. Such strategies also animate Australia's offshore processing regime, wherein the government seeks to export risks and escape responsibility for processing asylum claims and protecting refugees in keeping with international and domestic law. While this 'ambiguous architecture of risk' has made it increasingly difficult for affected asylum seekers to challenge Australia's practices of refugee deterrence and border control,³⁰ its offshore detention regime has been contested through civil and constitutional litigation in both Australian and PNG courts. Two court cases in particular – both initiated by or on behalf of asylum seekers and refugees at the Manus Island RPC – have transformed the broader political terrain. These cases were brought against state authorities and the corporations running the offshore detention camps.

The first case, initiated in December 2014, was a class action for negligence instigated in the Victorian Supreme Court by Iranian asylum seeker Majid Kamasae on behalf of all people who had been detained at the Manus Island RPC over the previous two years.³¹ The torts claim was brought against the Australian government and the two private contractors (Transfield/Broadspectrum and G4S) that had been responsible for the management of the Manus RPC over the claim period.³² Mr Kamasae had himself been forcibly transferred to PNG around August 2013 but had been returned to Australia in July 2014 for medical treatment. A key argument was that the responsible parties had failed to provide people detained at the RPC with a reasonable standard of services – measured in relation to Australian community expectations – or a reasonable level of protection from 'physical violence or intimidation, discrimination, ostracisms, bullying or other anti-social behaviour' from other detainees or third parties.³³ This failure, the claim alleged, was particularly harmful given the shared characteristics of the individuals detained, namely people with 'complex' asylum claims who had or were likely to have fled violence and travelled to Australia under dangerous circumstances.³⁴

In July 2017, just one day before the case was due to be heard in the Victorian Supreme court (including allowing for global live streaming), it was announced that an out-of-court settlement had been reached, with the Australian government agreeing to pay a reported

²⁹ Georg Menz, 'Neo-Liberalism, Privatization and the Outsourcing of Migration Management: A Five-Country Comparison' (2011) 15(2) *Competition & Change* 116, 117.

³⁰ Leanne Weber and Sharon Pickering, *Globalization and Borders: Death at the Global Frontier* (Palgrave Macmillan, 2011) 163. See also Sharon Pickering and Leanne Weber, 'Hardening the Rule of Law and Asylum Seekers: Exporting Risk and the Juridical Censure of State Illegality' in Elizabeth Stanley and Jude McCulloch (eds), *State Crime and Resistance* (Routledge, 2013) 183.

³¹ The claim initially concerned personal injury but was later expanded to cover the additional count of false imprisonment. See further Gabrielle Holly, 'Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: *Kamasae v Commonwealth*' (2018) 19 *Melbourne Journal of International Law* 52.

³² Wilson Security was also joined at a later stage as a third party to the litigation.

³³ Statement of Claim, *Kamasae v Commonwealth* (Victorian Supreme Court, No 06770, 2014).

³⁴ See Statement of Claim, *Kamasae v Commonwealth* (Victorian Supreme Court, No 06770, 2014).

AU\$70 million in compensation and damages to the affected class of asylum seekers.³⁵ Said to be the largest human rights class action settled by the Australian government to date, 1,905 people detained on Manus Island between 2012 and 2016 were eligible for financial compensation. Speaking to the Australian media at the time, Mr Kamasae said that ‘Our voices have never been listened to, but today we are finally being heard and I hope everyone’s suffering can be over as quickly as possible’.³⁶ Other affected asylum seekers and refugees stressed the symbolic importance of the action as a powerful public acknowledgment that the conditions in Australia’s offshore detention regime are abusive, harmful and ultimately unlawful.³⁷ Yet, as the case was resolved through an out-of-court settlement, volumes of evidence documenting the conditions and experiences of the asylum seekers and refugees on Manus Island went unheard in open court, allowing the Australian government to maintain the fallacy that the settlement is not an admission of legal liability nor wrongdoing but rather a ‘prudent’ use of taxpayer dollars to avoid a lengthy trial.³⁸ Most importantly, the out-of-court settlement did nothing to commit the Australia government to redressing the ongoing harms inflicted upon those who remained in the RPC, specifically the political uncertainty about their legal status or their futures. As Pakistani refugee Naeem stated, when expressing his disappointment in the settlement, ‘[m]oney cannot [give me] back the four years of my life that I have lost, without committing any crime’.³⁹ While the case was brought against the government and private contractors alike, it is unclear whether the settlement commits Transfield/Broadspectrum or G4S to pay any compensation—demonstrating yet again how the legal architecture of outsourcing allows for public funds to generate private profit while the legal liability for compensation rests with the public authorities and public expense.

A second case concerning the legality of the Manus Island RPC was brought before the PNG courts in 2015, by Belden Namah, the then PNG opposition leader. In April 2016, the PNG Supreme Court declared the Manus Island RPC to be unconstitutional, in part because it limited the right to freedom of movement enshrined in the PNG Constitution.⁴⁰ At that point, the RPC was a ‘closed’ centre with secure fencing that resembled a prison, which detained men on an indefinite basis with only a few, limited, so-called ‘excursions’. A day after the

³⁵ Ben Doherty and Calla Wahlquist, ‘Government to pay \$70m damages to 1,905 Manus detainees in class action’, *The Guardian* (14 June 2017), <https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action>

³⁶ Ibid.

³⁷ See, eg, interview with Behrouz Boochani in Martin McKenzie-Murray, ‘The wrong kind of settlement’, *The Saturday Paper* (17 June 2017), <https://www.thesaturdaypaper.com.au/news/politics/2017/06/17/the-wrong-kind-settlement/14976216004800>.

³⁸ See Immigration Minister Peter Dutton’s remarks that ‘An anticipated six-month legal battle for this case would have cost tens of millions of dollars in legal fees alone, with an unknown outcome’ in Michael Koziol, ‘Court approves \$70 million compensation payout to Manus Island detainee’, *Sydney Morning Herald* (6 September 2017), <https://www.smh.com.au/politics/federal/court-approves-70-million-compensation-payout-to-manus-island-detainees-20170906-gybpjy.html>.

³⁹ Stefan Armbruster, ‘Refugees afraid, confused as Manus detention centre shutdown begins’, *ABC News* (9 July 2017), <https://www.sbs.com.au/news/refugees-afraid-confused-as-manus-detention-centre-shutdown-begins>

⁴⁰ *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016). For a detailed earlier analysis of the case, see Azadeh Dastyari and Maria O-Sullivan, ‘Not For Export: The Failure of Australia’s Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in *Namah* (2016)’ 42 *Monash University Law Review* 308.

court ruling, the PNG Prime Minister Peter O’Neill announced the impending closure of the Manus Island RPC and urged Australia to ‘immediately’ make alternative arrangements for the affected men.⁴¹ As an interim measure, the RPC was transformed into an ‘open’ centre, allowing those living there to leave the compound during the day.⁴² While some transport was provided for the men to access Lorengau township, ongoing tensions in the local community over the politics and socio-economic impact of the Manus Island RPC meant that the men’s movement was constrained by security concerns. Given this change in the centre’s operation, in March 2017, the PNG Supreme Court Chief Justice declared that the Manus Island RPC had as a matter of law been closed, and that the ‘transferees’ were in fact being accommodated at the Lombrum Navy base by the PNG government with the assistance of the Australian government.⁴³ His declaration effectively removed any legal obligation to relocate the refugees to a different facility in PNG. Nonetheless, in April 2017, the PNG and Australian Prime Ministers jointly announced that the Manus Island RPC would cease its operations on 31 October that year, a move partly seen as a way of accelerating and incentivising the integration of refugees in the PNG community.⁴⁴ The closure date of 31 October 2017 coincided, not-coincidentally, with the end of Broadspectrum’s contract with the Australian government.

The physical closure of the RPC was protracted and brutal. Australian government-contracted service providers, at the behest of the state, attempted to force the asylum seekers and refugees to ‘voluntarily’ relocate to the new facilities by dismantling sections of the RPC and denying services. By May 2017, five months ahead of the official closure, facilities including the telephone room had been removed, and the provision of power, water, cleaning services and food reduced across the RPC.⁴⁵ Small ‘luxuries’ such as cigarettes, tea, sugar, coffee, fruit, English language classes, internet and gym access also ceased. This deliberate withdrawal of essential services authorised by both Australian and PNG authorities and the companies contracted to run the RPC manifested a form of ‘slow violence’ that deprived the affected asylum seekers and refugees of the necessary conditions for life over a protracted period.⁴⁶

⁴¹ Stephanie Anderson, ‘Manus Island detention centre to be shut, Papua New Guinea Prime Minister Peter O’Neill says’, *ABC News* (28 April 2016), <http://www.abc.net.au/news/2016-04-27/png-pm-oneill-to-shut-manus-island-detention-centre/7364414>

⁴² Their movement was limited to the Manus Province area, and men still require permission to travel to say Port Moresby.

⁴³ *Boochani v Independent State of Papua New Guinea* [2017] PGSC 4 (13 March 2017).

⁴⁴ ‘Manus Island immigration detention centre to close by year’s end’, *SBS News* (10 April 2017), <https://www.sbs.com.au/news/manus-island-immigration-detention-centre-to-close-by-year-s-end>.

⁴⁵ The first part of the RPC to close was N Block in the Foxtrot compound on 28 May 2017. Radio New Zealand, ‘Power, water cut to Manus Island detention centre’ (1 August 2017), <http://www.radionz.co.nz/international/pacific-news/336227/power-water-cut-to-manus-island-detention-centre>; <https://medium.com/@shanebazzi/planned-closure-of-manus-detention-centre-bring-them-here-5f5564f3bb14>; <https://www.theguardian.com/australia-news/2017/may/15/manus-island-detention-centre-to-close-by-30-june-detainees-told>; Behrouz Boochani, ‘Days Before the Forced Closure of Manus, We Have No Safe Place to Go’, *The Guardian* (27 October 2017).

⁴⁶ Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2013); Thom Davies, Arshad Isakjee and Surindar Dhesi, ‘Violent Inaction: The Necropolitical Experience of Refugees in Europe’ (2017) 49(5) *Antipode* 1263..

In response, at the start of August 2017, the men living in the Manus Island RPC began a daily protest that called upon the Australian government to acknowledge its responsibility for their basic rights, their conditions of detention and their future resettlement. Each day, the men uploaded photos and at times videos of their collective protests on social media, using handwritten signs in English highlight the brutality and hypocrisy of the Australian government's purported humanitarianism, including messages such as:

Australia, why are you killing us?

The Government of Australia evades its responsibility towards us

The Government of Australia claims Humanity but where its humanity?

In anticipation of the Manus Island RPC closure, the Australian government contracted the multinational global logistics company Toll Group to expand an existing facility – the East Lorengau RTC – and build two additional centres, in order to transfer men from the Manus Island RPC. The contract was valued at AU\$30 million.⁴⁷ Yet by the Australian government's own admission, the new accommodation remained unfinished just days prior to the RPC's closure, prompting the UNHCR to condemn the relocation policy, stating as late as November that the new facilities were still 'incomplete, sub-standard... and unsanitary'.⁴⁸ As an inducement to move, the refugees were told that those who relocated to the East Lorengau RTC would be given a weekly allowance. Yet many of the refugees expressed concerns that the new temporary accommodation was not a viable or safe alternative, citing fears about their personal safety given escalating tensions between the Manus locals and the refugees in the previous years as well as the local lack of prospects for future livelihoods.⁴⁹ One such violent incident had resulted in the murder of Kurdish asylum seeker Reza Barati in February 2014, who was beaten to death by local G4S employees while inside the Manus Island RPC.

By the time Broadspectrum and Wilson Security staff left on the 31 October official closure date, the protests were in their 91st continuous day. The men had developed a sustained campaign of collective resistance from within the Manus Island RPC that was connected with refugee advocates and supporters in PNG, Australia and elsewhere. In the days that followed, the men occupied the decommissioned RPC, enduring starvation, infections, threats and incursions from the PNG military into the centre to sabotage already limited water and food supplies. Nonetheless, through their embodied protest the men asserted a form of autonomy against the authorities that had controlled their lives in the RPC, refusing to be yet again relocated against their will. As one Sudanese refugee Abdul Aziz Muhamat shared via a collaborative podcast he made with Australian journalist Michael Green, the occupation of

⁴⁷ According to government statistics, the East Lorengau RTC and West Lorengau Haus could accommodate around 400 and 300 refugees respectively, while Hillside House was designed to accommodate under 200 people who had not been recognised as refugees.

⁴⁸ <http://www.unhcr.org/5a3b0f317.pdf> and <http://www.unhcr.org/afr/news/briefing/2017/11/5a1465d14/australia-urged-ensure-protection-assistance-solutions-refugees-manus-island.html>

⁴⁹ Behrouz Boochani, 'Days before the forced closure of Manus, we have no safe place to go', *The Guardian* (27 October 2017), https://www.theguardian.com/commentisfree/2017/oct/27/days-before-the-forced-closure-of-manus-we-have-no-safe-place-to-go?mc_cid=fb97f9dcff&mc_eid=2559d89cc8

the RPC provided an opportunity for people to become ‘united’ through their endurance of hardship and their acts of defiance and self-determination:

we are looking after each other more than even before. It’s been like more than 4 and a half years we never had any opportunity to do so... every single man in detention now are contributing [by building wells, doing security around centre]... we are using that kind of resistance and the resilience that we have ... we are paying the price of our freedom.⁵⁰

On 7 November 2017, a week after the official closure of the Manus Island RPC, the PNG Supreme Court rejected a last-ditch legal application lodged on behalf of Behrouz Boochani to force the PNG state to restore essential services such as power, water, food, sanitation and medical services to the centre.⁵¹ Responding to the decision, Boochani wrote on social media that ‘We the refugees in Manus are outside of law and justice. There is no justice for the refugees and we are used to the court decisions going against us.’⁵²

The defiant standoff continued, lasting three weeks until the PNG military violently evicted the men and forced them to relocate to the new facilities. Amnesty International termed the standoff a ‘humanitarian crisis of the Australian and PNG governments’ own making’, noting that the forced relocation of the men:

was carried out in a demeaning and deeply humiliating manner – with refugees forced to relocate to newer, but still temporary, sites that were also poorly equipped, overcrowded, unsafe and lacking in basic services such as water and power. In effect, the refugees and asylum seekers have been shuttled from one prison-like centre to several others, with no improvement to their situation.⁵³

Ultimately, the forced relocations to the new facilities merely replaced one visible crisis with another, characterised by the underlying structural violence and ongoing legal uncertainty and political abandonment surrounding the future of the asylum seekers and refugees held on Manus Island. As Iranian refugee Mehdi Maleknia is reported to have said in the wake of the forced relocation, ‘Yes, it’s a nicer prison. But what we want is not a nice place, we want our freedom’.⁵⁴

⁵⁰ Excerpt from ‘We Are Looking After Each Other’ (The Messenger Podcast, 21 November 2017), <https://www.wheelercentre.com/broadcasts/podcasts/the-messenger/we-are-looking-after-each-other>

⁵¹ Fergus Hunter, ‘PNG court quashes detainees’ last-ditch bid to keep Manus centre open’, *The Age* (7 November 2017), <http://www.theage.com.au/federal-politics/political-news/png-court-quashes-detainees-lastditch-bid-to-keep-manus-centre-open-20171107-gzgbe3.html>.

⁵² Behrouz Boochani, Facebook post, 7 November 2017 (on file with author).

⁵³ Amnesty International, *Punishment Not Protection* (Report, January 2018).

⁵⁴ ‘All Manus Island refugees evicted from detention centre’, *Radio NZ* (24 November 2017), <https://www.radionz.co.nz/international/pacific-news/344619/all-manus-island-refugees-evicted-from-detention-centre>.

Conclusion

The forced closure of the Manus Island RPC in October 2017 made visible the physical brutality and produced suffering that animates Australia's paradigm of asylum seeker deterrence. Less visible was the enduring structural violence that informed how the Australian state, through the dual strategies of contracting of private for-profit service providers and enrolling neighbouring states into its offshore detention regime, had created a situation of calculated legal limbo and prolonged abandonment for the refugees on Manus Island and Nauru. In this chapter, I have traced the evolution of Australia's offshore processing regime in relation to broader trends and effects concerning the privatisation of Australian immigration detention centres since the 1990s and the contested economics of asylum in Australia today. Behrouz Boochani, for example, has similarly refused to pathologize his emotional experience of Australia's offshore detention regime and instead locates his pain, and that of his fellow refugees, within Australia's neo-colonial relations with PNG authorities and people, including the logics of imperial profit-seeking and extraction:

‘Only a meta-historical and transhistorical approach can unpack the peculiarities associated with the issue of Manus and Nauru. Only a rigorous analysis of a colonial presence in Australia and its tactics in the region can disclose the reality of violence in these island prisons.... This form of affliction, inflicted on people in similarly vulnerable situations, has always existed in the history of modern Australia. Pain and suffering systematically inflicted on defenceless and vulnerable bodies.’⁵⁵

As Maurice Stierl has argued, holding onto the ambiguities of migrant struggles allows for an understanding of migrant protagonists as ‘complex subjects, subjects able to be traumatised and resistant, scared and hopeful, captured and recalcitrant’.⁵⁶ Similarly, as I suggest in this chapter, instances of refugee claim-making in legal settings constitute a form of political action that fed into broader struggles for articulating relationships of political, moral and legal responsibility in relation to both state authorities and the private corporations that states engage in an attempt to outsource their liability toward asylum seekers and refugees. While legal actions of negligence or false imprisonment rest upon a claim of injury, the men detained at the Manus Island RPC were able to strategically mobilise their claims to reshape the broader political contestations around the legality and legitimacy of Australia's detention regime. Using a range of tactics, including social media to amplify their struggles and demands, the men subject to Australia's carceral violence challenged the state of legal limbo and political abandonment in which they had long been subjected.

⁵⁵ Behrouz Boochani, ‘I write from Manus Island as a duty to history’, *The Guardian* (6 December 2017), <https://www.theguardian.com/commentisfree/2017/dec/06/i-write-from-manus-island-as-a-duty-to-history>

⁵⁶ Maurice Stierl, ‘Excessive Migration, Excessive Governance: Migrant Entanglements in Greek EU-rope’ in Nicholas de Genova (ed), *The Borders of “Europe”: Autonomy of Migration, Tactics of Bordering* (Duke University Press, 2017) 210, 231.