

**TRANSNATIONAL TORT AND ACCESS TO REMEDY  
UNDER THE UN GUIDING PRINCIPLES ON BUSINESS AND  
HUMAN RIGHTS:  
KAMASAE V COMMONWEALTH**

GABRIELLE HOLLY \*

*The Guiding Principles on Business and Human Rights ('UNGPs') set out a tripartite framework outlining the human rights obligations of states and responsibilities of business. However, until recently, little attention has been paid to the aspect of the framework that deals with access to remedy for victims of business-related human rights abuse. Renewed focus on access to remedy has drawn attention back to jurisdictions that have developed a body of jurisprudence, which, to varying degrees, will allow domestic courts to accept jurisdiction over claims where extraterritorial human rights violations are framed as civil suits and brought against a corporate actor in its home jurisdiction. *Kamasae v Commonwealth* ('Kamasae') is the first claim to test the Australian jurisdiction as a forum for transnational human rights litigation against a corporate defendant in 17 years, and the only claim of its nature to be brought in the era of the UNGPs. What *Kamasae* makes clear is that although transnational human rights litigation remains a critical avenue for obtaining remedy for breaches of human rights standards engaged in by corporate actors, without the fulfilment of the state duty to protect human right enshrined in the UNGPs, such claims are not capable of providing effective remedy.*

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\* Gabrielle Holly is an Australian qualified lawyer with many years of experience practicing in commercial dispute resolution in Australia and in the United Kingdom. She holds a combined LLB/BA (Hons) from the University of Western Australia and an LLM (Distinction) from the London School of Economics and Political Science. She is currently a Researcher in Business and Human Rights at the British Institute of International and Comparative Law in London.

## I INTRODUCTION

We are nearly 2,000 people who are being used as a political football; toyed with and exploited by Australia's political sphere. With less than a year from the next election, the two major political parties are once again vying to prove who can look tougher. Then there is the mysterious political economy around the island prisons. No one in Australia is really aware how and where money has been spent. No one really knows to what extent the private security companies that manage the Manus and Nauru detention centres have profited. No one fully understands their relationship with the country's system of power.<sup>1</sup>

Access to remedy for victims of business-related human rights abuse is one of the more intractable global legal and policy problems of the modern era. Although the United Nations *Guiding Principles on Business and Human Rights* ('*UNGPs*')<sup>2</sup> set out the human rights obligations of states and business, including with respect to access to remedy, until recently there has been little attention paid to this aspect of the *UNGPs* framework. The *UNGPs* envisage that access to remedy may be facilitated by a range of mechanisms, judicial and non-judicial, state and non-state based, but little progress has been made in developing effective mechanisms that may facilitate access to remedy beyond existing judicial mechanisms.

In the absence of specialised non-judicial or company led grievance mechanisms, conventional tort litigation can provide an avenue for private parties to bring suit against transnational corporations in domestic courts based on conduct which violates international human rights ('IHR') standards. Given the dearth of direct IHR obligations on corporate actors, and the difficulties associated with attaching liability to states for breaches of IHR standards by corporations, pursuing human rights breaches in the form of domestic tort claims remains one of the few avenues for those impacted by human rights violations to obtain effective remedy. While it may be preferable to bring a claim based on human rights abuses in the jurisdiction in which the underlying events occurred, where a domestic court in a host jurisdiction is unwilling or unable to provide a judicial avenue for redress, plaintiffs may seek to bring claims in the home state of a corporate actor.

*Kamasae v Commonwealth*<sup>3</sup> ('*Kamasae*') is the first claim to test the Australian jurisdiction as a forum for transnational human rights litigation<sup>4</sup>

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<sup>1</sup> Behrouz Boochani, 'The "Offshore Processing Centre" I Live in Is an Island Prison', *Financial Times* (online), 29 May 2018 <https://www.ft.com/content/00620a94-5db2-11e8-ad91-e01af256df68> archived at <<https://perma.cc/MU68-W6F9>>.

<sup>2</sup> John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises — Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 17<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex ('*Guiding Principles on Business and Human Rights*') ('*UNGPs*').

<sup>3</sup> Majid Karami Kamasae, 'Fourth Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 7 April 2017.

against a corporate defendant in 17 years,<sup>5</sup> and the only claim of its nature be brought in the era of the *UNGPs*. *Kamasae* was a class action suit brought in the Supreme Court of Victoria alleging that the Commonwealth of Australia and two corporate contractors who operated the immigration detention centre ('the Centre') on Manus Island in the Independent State of Papua New Guinea ('PNG') as part of Australia's offshore detention regime repeatedly breached a duty of care owed by them to asylum seekers detained in the Centre.

On 7 June 2017 a settlement deed was signed by the parties agreeing to settle for the sum of AUD70 million plus costs estimated at AUD20 million,<sup>6</sup> believed to be the largest human rights class action settlement in Australian history.<sup>7</sup> While the size of the settlement is undoubtedly substantial, many of the detainees who comprise the plaintiff group remain in a state of legal limbo as their resettlement prospects continue to be uncertain. Following the closure of the Centre on 31 October 2017, the detainees remaining in PNG continue to be exposed to threats against their security.<sup>8</sup>

As this claim was not ultimately resolved by a court, Australian businesses who carry on operations overseas still exist under a cloud of potential legal liability under the Australian legal system. Analysis of the parties' pleadings and the legal issues they raise may provide a road map for future plaintiffs and the quantum of the settlement sum may encourage future litigation. At the same time, *Kamasae* raises real questions about the viability of litigation and financial compensation to provide adequate remedy for rights-holders who have had their human rights impacted by corporate actors. The claim draws out the tensions between the pillars that comprise the tripartite *UNGPs* framework and

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<sup>4</sup> In this article 'transnational human rights litigation' refers to litigation brought against 'transnational corporations', being corporations who operate outside of the jurisdiction in which they are domiciled (the 'home state') and who are part of a transnational corporate group. These claims are typically framed in tort and are brought by impacted persons or communities from a jurisdiction outside of the home jurisdiction (the 'host state') in which a company operates seeking redress for human rights harms caused by the transnational activities of that company. While such claims may be 'extraterritorial' to the extent that they apply home state law to human rights harms occurring in a host state, where the characterisation process designates the applicable law as the law of the host state in which the harms occurred, the litigation would simply apply foreign law to home state proceedings and in essence be no more extraterritorial than an ordinary tort suit for harm abroad brought against a company in its home jurisdiction.

<sup>5</sup> With the exception of *Pierre v Anvil Mining Management NL* [2008] WASC 30, which did not progress past an initial application for pre-action discovery, the only other case of a similar nature is the Ok Tedi litigation, in which the plaintiff sought compensation for environmental damage and settled for an undisclosed sum. See *Dagi v Broken Hill Proprietary Co Ltd (No 2)* [1997] 1 VR 428 ('Dagi').

<sup>6</sup> Notice of Proposed Settlement in *Kamasae v Commonwealth*, S CI 2014 06770, 7 July 2017. See also Emma Younger and Loretta Florance, 'Commonwealth Agrees to Pay Manus Island Detainees \$70m in Class Action Settlement', *ABC News* (online), 14 June 2017 <<http://www.abc.net.au/news/2017-06-14/commonwealth-agrees-to-pay-manus-island-detainees-compensation/8616672>> archived at <<https://perma.cc/RJ85-B8VD>>.

<sup>7</sup> Michael Koziol, 'Court Approves \$70 Million Compensation Payout to Manus Island Detainees', *Sydney Morning Herald* (online), 6 September 2017 <<https://www.smh.com.au/politics/federal/court-approves-70-million-compensation-payout-to-manus-island-detainees-20170906-gybpjy.html>>.

<sup>8</sup> Eric Tlozek, 'Locals Threaten Violence against Manus Island Asylum Seekers at New Accommodation', *ABC News* (online), 11 December 2017 <<http://www.abc.net.au/news/2017-12-11/manus-island-asylum-seekers-threatened-by-locals/9244834>> archived at <<https://perma.cc/EZ4V-KC8F>>.

lays bare the particular difficulty that arises when a government is a codefendant to a claim against its corporate contractors, and where the matters the subject of such a claim directly concern acts done by those corporate contractors in discharge of government policy. What *Kamasae* makes clear is that although transnational tort claims remain a critical avenue for obtaining remedy for breaches of human rights standards engaged in by corporate actors, without the fulfilment of the state duty to protect human rights enshrined in the first pillar of the *UNGPs*, such claims are not capable of providing effective remedy as understood in the *UNGPs* framework.

## II THE *UNGPs*, EXTRATERRITORIALITY AND THE GOVERNANCE GAP

Concerns around the impact of business activities on human rights has been firmly on the global agenda since the 1990s, accompanied by attempts at the international level to impose direct hard law IHR obligations on transnational corporations.<sup>9</sup> However it was not until the unanimous adoption of the *UNGPs* by the UN Human Rights Committee in 2011 that a single, coherent framework was generally accepted around which efforts to address the impact of business on human rights and the problem of corporate impunity could develop. Rather than seeking to create new international law obligations, the stated normative contribution of the *UNGPs* was in ‘elaborating the implications of existing standards and practices for States and businesses’<sup>10</sup> and integrating them into a single comprehensive template providing a global common platform for action.

The *UNGPs* provide a set of foundational operational principles structured around three pillars that states and business enterprises should adhere to in order to ensure that human rights are respected, structured around three pillars: first, the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication; second, the corporate responsibility to respect human rights, which includes acting with due diligence to avoid infringing on the rights of others and to address human rights impacts in which they are involved; and third, the need for

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<sup>9</sup> See, eg, Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55<sup>th</sup> sess, 22<sup>nd</sup> mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003). These initial attempts were vehemently opposed by international business lobby groups: see, eg, International Chamber of Commerce and International Organization of Employers, *Joint Written Statement Submitted by the International Chamber of Commerce and the International Organization of Employers, Non-Governmental Organizations in General Consultative Status*, UN ESCOR, 55<sup>th</sup> sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/NGO/44 (29 July 2003). More recently, the Human Rights Council has voted to establish an intergovernmental working group to develop a binding treaty on transnational corporations and human rights, which remains in development: see Human Rights Council, *Resolution 26/9: Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 26<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/26/L.22/Rev.1 (14 July 2014) (*‘Resolution 26/9’*).

<sup>10</sup> John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises — Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, 17<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) 5 [14] (*‘Ruggie Report’*).

greater access to effective remedy for victims of human rights abuses, both judicial and non-judicial.<sup>11</sup>

The primary intervention of international law in the area of business and human rights lies in the imposition of obligations on states to respect, protect and fulfil human rights captured in the first pillar of the *UNGPs*. Although the extent of the extraterritoriality of this obligation is a matter of some debate,<sup>12</sup> it is settled that international law obliges states to refrain from engaging in behaviour that would violate human rights, to proactively take action to protect the human rights of individuals through legislative and other measures and to exercise due diligence to ensure that private actors do not violate human rights standards.<sup>13</sup>

The *UNGPs* envisage that states may regulate the extraterritorial activities of corporate actors domiciled in their territory or jurisdiction provided that there is an adequate jurisdictional basis.<sup>14</sup> However, the accompanying commentary notes that there is presently no obligation on states under IHR law to do so.<sup>15</sup> Further, there are no enforcement mechanisms to ensure compliance with the *UNGPs*, and with the exception of the obligation of non-state actors to comply with international criminal law, there are no direct international law obligations on corporate actors to respect human rights.<sup>16</sup> As such, it has been largely left to domestic law to protect IHR standards and provide redress for their contravention by business actors. Where a company undertakes activities that contravene IHR standards outside of its home jurisdiction, and there is a lack of appetite on the part of the host state to act, the potential for adequate remedy to be obtained often depends on the degree to which a home state is willing to regulate the extraterritorial activities of business and provide access to judicial and non-judicial remedies to sanction breaches of IHR standards. Despite this, states have often displayed reluctance to regulate the extraterritorial activities of business domiciled in their jurisdiction and legislative attempts to do so have to

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<sup>11</sup> Ibid 4 [6].

<sup>12</sup> See, eg, Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598; Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and Home State Advantage* (Routledge, 2014) 182–3; Daniel Augenstein and David Kinley, 'When Human Rights "Responsibilities" Become "Duties": The Extra-Territorial Obligations of States that Bind Corporations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 271.

<sup>13</sup> See Robert McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 *Journal of Business Ethics* 385; Simons and Macklin, above n 12, 5.

<sup>14</sup> *UNGPs*, UN Doc A/HRC/17/31, Guiding Principle 2.

<sup>15</sup> See commentary to Guiding Principle 2: *Ruggie Report*, UN Doc A/HRC/17/31, 7.

<sup>16</sup> See Simons and Macklin, above n 12, 5.

date been largely unsuccessful.<sup>17</sup> In Australia, a Corporate Code of Conduct Bill 2000 ('the Bill')<sup>18</sup> was introduced in 2000 with the object of imposing environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations that employ more than 100 persons in a foreign country.<sup>19</sup> The Bill, and a revised version thereof,<sup>20</sup> ultimately failed to secure support and did not pass into law.

This reluctance contributes to a significant governance gap<sup>21</sup> with respect to the overseas activities of corporate actors between the normative standards set out in the *UNGPs*, the measures that individual states have taken to regulate business activity and self-regulatory measures undertaken by business. There remains a considerable level of disagreement around how to address this governance gap in order to prevent extraterritorial violations of human rights standards, including around whether extraterritorial regulation is necessary or desirable.<sup>22</sup>

While such debates around the appropriateness of extraterritorial regulation are ongoing, there has been a renewed focus on the need for access to remedy enshrined in the third pillar of the *UNGPs* to restrain corporate impunity by providing adequate remedy where extraterritorial human rights violations do

<sup>17</sup> See, eg, the failed legislative attempts in Australia, Canada, the UK and the United States, respectively: Corporate Code of Conduct Bill 2000 (Cth); Bill C-300, *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 3rd Sess, 40<sup>th</sup> Parl, 2010 (defeated at report stage); Corporate Responsibility HC Bill (2002–03); Corporate Code of Conduct Act, HR 4596, 106<sup>th</sup> Congress (2000). However, it must be noted that there are a number of more recent measures that do, to a degree, regulate the extraterritorial human rights impacts of business. For example, the reporting requirement under s 54 of the *Modern Slavery Act 2015* requires companies in the UK with a certain turnover to report on the steps the company has taken to ensure that slavery and human trafficking has not taken place in its supply chains or in its own business or to report if no steps have been taken (a similar measure is slated to be introduced in Australia in 2019): *Modern Slavery Act 2015* (UK) 62 Eliz 2, c 30. Similarly, French law imposes a duty of care on certain French companies, which extends to harms deriving from the parent company and subcontracting companies' activities, the activities of companies controlled directly or down the supply chain and the activities of subcontractors and suppliers 'with which the company maintains an established commercial relationship': *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Law No 2017-399 of 27 March 2017 relating to the Duty of Vigilance of Parent Companies and Ordering Companies] (France) JO, 28 March 2017, art 1 ('*Law No 2017-399*') [author's trans]. In order to discharge the duty of care, companies need to implement a 'vigilance plan', which should include reasonable measures to adequately identify risks and prevent serious violations of human rights: *Law No 2017-399*, art 1. Such measures depart from the traditional command and control form of regulation and adopt regulatory techniques which borrow from reflexive law theory.

<sup>18</sup> Corporate Code of Conduct Bill 2000 (Cth).

<sup>19</sup> Corporate Code of Conduct Bill 2000 (Cth) s 3(1).

<sup>20</sup> See Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2009) 167.

<sup>21</sup> This term was coined by Georgette Gagnon, Audrey Macklin and Penelope Simons in their report: Georgette Gagnon, Audrey Macklin and Penelope Simons, 'Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones — Implications for Human Rights and Canadian Public Policy' (Research Report, Relationships in Transition: A Strategic Joint Initiative of the Social Sciences and Humanities Research Council and the Law Commission of Canada, January 2003) <<https://www.law.utoronto.ca/documents/Macklin/DeconstructingEngagement.pdf>> archived at <<https://perma.cc/MF53-CLJD>>.

<sup>22</sup> See, eg, Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' (2018) 3 *Business and Human Rights Journal* 47.

occur. That access to remedy is now firmly on the agenda was made clear by the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises selected access to remedy to be the unifying theme for the 2017 UN Forum on Business and Human Rights,<sup>23</sup> following its report to the UN General Assembly on access to remedy under the *UNGPs*.<sup>24</sup> This renewed push for access to remedy has drawn focus back to jurisdictions that have developed a body of jurisprudence which, to varying degrees, will allow domestic courts to accept jurisdiction over claims where extraterritorial human rights violations are framed as civil suits and brought against a corporate actor in its home jurisdiction. Australian courts have shown themselves to be receptive to claims with an extraterritorial flavour, making it a potentially attractive jurisdiction in which to bring transnational tort claims seeking to hold to account corporate actors who are alleged to have violated human rights standards in their overseas operations.

### III TRANSNATIONAL TORT AND THIRD PILLAR ACCESS TO REMEDY

In the absence of specialised processes dealing with remedy for wrongs arising from the human rights impacts of business, conventional tort litigation can provide an avenue for private parties to bring suit against multinational corporations for conduct that violates IHR standards through the domestic courts of home or host states. Access to remedy through private actions under domestic law remains one of the few concrete means of obtaining remedy, and as such has an important role to play in operationalising the *UNGPs*.

It is usually preferable to bring a claim based on human rights abuses or prosecute such abuses in the jurisdiction in which the underlying events have occurred. However, host states, particularly those that are in zones of weak governance, often lack the ability or the political will to prosecute or provide civil causes of action.<sup>25</sup> This may be because a host state has elected to eschew regulation in an effort to secure inward foreign investment, where a local government is ineffective or corrupt or complicit in human rights abuses, or where a host state simply lacks a sufficiently sophisticated legal and judicial system to prosecute or facilitate civil claims.<sup>26</sup>

Where a domestic court in a host jurisdiction is unwilling or unable to provide a judicial avenue for redress, plaintiffs may choose to bring claims in the home state of a corporate actor. Jurisdictions such as Australia, Canada,<sup>27</sup> Germany,<sup>28</sup>

<sup>23</sup> Held at the Palais des Nations in Geneva, 27–29 November 2017.

<sup>24</sup> Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN GAOR, 72<sup>nd</sup> sess, Provisional Agenda Item 73(b), UN Doc A/72/162 (18 July 2017).

<sup>25</sup> See Gregory R Day, 'Private Solutions to Global Crises' (2015) 89 *St John's Law Review* 1079.

<sup>26</sup> See Simons and Macklin, above n 12, 181.

<sup>27</sup> See, eg, *Choc v Hudbay Minerals Inc* [2013] ONSC 1414; *Garcia v Tahoe Resources Inc* [2017] BCCA 39; *Araya v Newsun Resources Ltd* [2016] BCSC 1856; *Das v George Weston Ltd* [2017] ONSC 4129.

<sup>28</sup> See, eg, *Landgericht Dortmund* [Dortmund District Court] 7 O 95/15, 29 August 2016 [author's trans]: the first transnational tort claim alleging that a German company owed a duty of care to employees of its foreign supplier.

the Netherlands,<sup>29</sup> the United Kingdom<sup>30</sup> and the United States<sup>31</sup> have seen significant recent decisions and innovative claims in progress that have taken an expansive view of the jurisdiction of their courts and developed the law on corporate liability for extraterritorial activities, including adverse human rights impacts.<sup>32</sup>

Although some overarching solutions have been proposed, such as specialist arbitral procedures to resolve business and human rights disputes,<sup>33</sup> and the negotiation of a new treaty to address the human rights impacts of multinational corporations,<sup>34</sup> there is still much work to be done to find a suitable solution. Criminal prosecutions of corporate actors for egregious human rights abuses

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<sup>29</sup> See, eg, *Akpan v Royal Dutch Shell PLC*, Rechtbank Den Haag [The Hague District Court], C/09/337050/HA ZA 09–1580, 30 January 2013 [author’s trans].

<sup>30</sup> See, eg, recent cases that have developed the law on direct parent company liability, including: *Chandler v Cape plc* [2012] EWCA Civ 525; *Thompson v Renwick Group plc* [2014] EWCA Civ 635; *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 1528. At the time of publishing, this decision is under appeal. See also *Okpabi v Royal Dutch Shell plc* [2018] EWCA Civ 191. At the time of publishing, leave had been sought to appeal this decision. For an in-depth analysis of the requirements for establishing direct parent company liability under UK tort law, see Anil Yilmaz-Vastardis and Sheldon Leader, ‘Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains: A Legal Guide’ (Legal Guide, Essex Business and Human Rights Project, University of Essex, December 2017) <<http://repository.essex.ac.uk/21636/1/Improving-Paths-to-Accountability-for-Human-Rights-Abuses-in-the-Global-Supply-Chains-A-Legal-Guide.pdf>> archived at <<https://perma.cc/K2QD-3MLE>>.

<sup>31</sup> US cases have considered the scope of the *Alien Tort Statute*, 28 USC § 1350 (‘*Alien Tort Statute*’). See, eg, *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013). However, the recent decision in *Jesner v Arab Bank plc*, handed down on 24 April 2018, has significantly curtailed the scope of the *Alien Tort Statute*, finding that foreign corporations may not be defendants in *Alien Tort Statute* claims: see *Jesner v Arab Bank plc* (2<sup>nd</sup> Circ, No 16–499, 24 April 2018). In a different context, the US has seen a number of consumer claims being brought against companies seeking to attach liability for allegedly false statements and/or material omissions of fact concerning the working conditions in their supply chains. See, eg, *Nike Inc v Kasky* 539 US 654 (Cal, 2003); *Barber v Nestlé USA Inc*, 154 F Supp 3d 954 (CD Cal, 2015); *McCoy v Nestlé USA Inc*, 173 F Supp 3d 954 (ND Cal, 2016); *Wirth v Mars Inc* (CD Cal, SACV 15-1470-DOC(KESx), 5 February 2016); *Hodson v Mars Inc*, 162 F Supp 3d 1016 (ND Cal, 2016); *Dana v The Hershey Company*, 180 F Supp 3d 652 (ND Cal, 2016); *Sud v Costco Wholesale Corp*, 229 F Supp 3d 1075 (ND Cal, 2017); Danell Tomasella, ‘Class Action Complaint’, Submission in *Tomasella v Nestlé*, 1:18-cv-10269, 12 February 2018.

<sup>32</sup> For a good overview of the development of litigation of this nature outside the US, see Richard Meeran, ‘Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States’ (2011) 3 *City University of Hong Kong Law Review* 1; Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004).

<sup>33</sup> See, eg, Claes Cronstedt, Jan Eijsbouts and Robert C Thompson, ‘International Business and Human Rights Arbitration’ (13 February 2017) <<http://www.l4bb.org/news/TribunalV6.pdf>> archived at <<https://perma.cc/FRZ4-S4NL>>.

<sup>34</sup> See *Resolution 26/9*, UN Doc A/HRC/26/L.22/Rev.1. Following consultation, a Business and Human Rights International Arbitration Project has been launched and a drafting team has been assembled to prepare a set of arbitral rules for international disputes concerning business-related human rights abuses. See Business and Human Rights Resource Centre, ‘Business and Human Rights International Arbitration Project Report — First Drafting Team Meeting, 25 and 26 January 2018’ (Report, January 2018) <<https://www.business-humanrights.org/>> archived at <<https://perma.cc/D82M-FB7J>>.



remain rare,<sup>35</sup> and transnational human rights litigation is often one of the only means of redress against corporate actors who commit acts that violate human rights standards, or are complicit in such violations.<sup>36</sup>

#### IV CASE STUDY: CLAIMS BROUGHT AGAINST CORPORATE OPERATORS OF DETENTION FACILITIES ON MANUS

##### A *Australia's Policy of Offshore Detention*

In an effort to combat maritime people smuggling, Australia has adopted strict policies designed to deter asylum seekers from attempting to enter Australian territory by boat. These policies have evolved with a succession of governments, gradually taking the shape and adopting the features of the current policy, 'Operation Sovereign Borders', a military operation with a mandate to stop 'Suspected Illegal Entry Vessels' ('SIEVs') from entering Australian territory. Asylum seekers travelling on SIEVs are prevented from landing in Australia, either by Australian defence forces turning a SIEV back and returning it to international waters, or by detaining the asylum seekers on board before they are transferred to offshore processing centres on Manus or Nauru or returned to their country of origin.<sup>37</sup>

From 2013 onwards, all asylum seekers who have travelled to Australia by boat without appropriate authorisation are sent offshore for processing and resettlement. Under this policy a person who attempts to travel to Australia by boat will never be resettled in Australia, even where they are determined to be a refugee. Those found not to be refugees are returned to their home country or are

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<sup>35</sup> And in any event, may not provide an adequate remedy to victims: see International Commission of Jurists, *Corporate Complicity & Legal Accountability* (2008) vol 2. A notable recent exception is the criminal complaint that has been brought in France against French firm Lafarge alleging complicity in crimes against humanity in Syria and terrorist financing: See Agence France-Presse, 'Lafarge Charged with Complicity in Syria Crimes against Humanity', *The Guardian* (online), 29 June 2018 <[https://www.theguardian.com/world/2018/jun/28/lafarge-charged-with-complicity-in-syria-crimes-against-humanity?CMP=share\\_btn\\_tw](https://www.theguardian.com/world/2018/jun/28/lafarge-charged-with-complicity-in-syria-crimes-against-humanity?CMP=share_btn_tw)> archived at <<https://perma.cc/3KV2-7SXX>>.

<sup>36</sup> Non-judicial processes such as the complaints procedures established under the Organisation for Economic Co-operation and Development *Guidelines for Multinational Enterprises* are one means by which a complaint against a company may be made where it is alleged that the company has acted inconsistently with its obligations under the *Guidelines*, which include obligations as to human rights. See Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises* (OECD Publishing, 2011). However, this mechanism is non-binding and its effectiveness has been the subject of criticism. See, eg, a report prepared by Amnesty International: Amnesty International, *Obstacle Course: How the UK's National Contact Point Handles Human Rights Complaints under the OECD Guidelines for Multinational Enterprises* (Report, February 2016).

<sup>37</sup> See Scott Morrison, Minister for Immigration and Border Protection, 'Operation Sovereign Borders' (Press Release, 23 September 2013) <[http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3099126/upload\\_binary/3099126.pdf;fileType=application%2Fpdf#search=%22media/pressrel/3099126%22](http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3099126/upload_binary/3099126.pdf;fileType=application%2Fpdf#search=%22media/pressrel/3099126%22)> archived at <<https://perma.cc/GBT9-9NBJ>>.

subject to indefinite detention in a transit facility.<sup>38</sup> This system of mandatory, indefinite extraterritorial detention of asylum seekers arriving by boat is unique to Australia.<sup>39</sup> Although there have been a number of claims brought against the Australian Government challenging the legality of various aspects of Australia's regime of indefinite offshore processing and detention,<sup>40</sup> none have been successful<sup>41</sup> and, prior to *Kamasae*, none had brought suit directly against the corporate contractors who facilitated the offshore detention regime.

### B Detention Conditions

The poor living conditions at the Centre are well documented, including by the Australian Human Rights Commission,<sup>42</sup> Australian Senate Committee reports,<sup>43</sup> independent reports,<sup>44</sup> UN bodies<sup>45</sup> and by NGOs<sup>46</sup> and grassroots

<sup>38</sup> This aspect of the policy was introduced by the then Labor government in 2013: see Prime Minister (Cth), Attorney General and Minister for Immigration, 'Australia and Papua New Guinea Regional Settlement Arrangement' (Press Release, 19 July 2013) <[http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2611769/upload\\_binary/2611769.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2611769%22](http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2611769/upload_binary/2611769.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2611769%22)> archived at <<https://perma.cc/S8QB-ZMXN>>. However, this aspect of the policy has been continued by the successor Liberal government as part of Operation Sovereign Borders.

<sup>39</sup> Brynn O'Brien, 'Extraterritorial Detention Contracting in Australia and the UN *Guiding Principles on Business and Human Rights*', 1 *Business and Human Rights Journal* 333, 333.

<sup>40</sup> These include: *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, which challenged the legality of offshore detention on Nauru; *Plaintiff S156-2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, which challenged the legality of offshore detention on Manus; *Al-Kateb v Godwin* (2004) 219 CLR 562, in which indefinite detention was found to be authorised under the *Migration Act 1958* (Cth).

<sup>41</sup> This is in part due to interventions by the Australian Government. During one such High Court challenge, which challenged the legality of offshore closed detention on Nauru, the Australian government took the extraordinary step of passing legislation to amend the provisions of the *Migration Act 1958* (Cth) and the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth) that were the subject of the constitutional challenge while the proceedings were on foot, and took steps to change the detention arrangements on Nauru to make it an 'open centre arrangement', effectively pre-empting the outcome of the case: *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 149–50 [339]–[343] (Gordon J).

<sup>42</sup> Australian Human Rights Commission, 'Asylum Seekers, Refugees and Human Rights: Snapshot Report' (Report, 2013) <[https://www.humanrights.gov.au/sites/default/files/document/publication/snapshot\\_report\\_2013.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/snapshot_report_2013.pdf)> archived at <<https://perma.cc/495Y-EDYH>>.

<sup>43</sup> 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).

<sup>44</sup> Robert Cornall, 'Review into the Allegations of Sexual and Other Serious Assaults at the Manus Regional Processing Centre' (Report, September 2013) <<https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-manus-offshore-processing-centre-publication-sep2013.pdf>> archived at <<https://perma.cc/ET69-YFY8>>; Robert Cornall, 'Review into the Events of 16–18 February 2014 at the Manus Regional Processing Centre' (Report, 23 May 2014) <[https://www.huffingtonpost.com.au/2017/07/25/all-the-times-the-un-has-slammed-australias-asylum-seeker-polic\\_a\\_23046469/](https://www.huffingtonpost.com.au/2017/07/25/all-the-times-the-un-has-slammed-australias-asylum-seeker-polic_a_23046469/)> archived at <<https://perma.cc/P3TF-6JWJ>>.

<sup>45</sup> Josh Butler, 'All the Times the UN Has Slammed Australia's Asylum Seeker Policy', *Huffington Post* (online), 25 July 2017 <[https://www.huffingtonpost.com.au/2017/07/25/all-the-times-the-un-has-slammed-australias-asylum-seeker-polic\\_a\\_23046469/](https://www.huffingtonpost.com.au/2017/07/25/all-the-times-the-un-has-slammed-australias-asylum-seeker-polic_a_23046469/)> archived at <<https://perma.cc/32QA-A53Y>>.

groups.<sup>47</sup> At a more systemic level, Australia's policy of mandatory detention has been consistently found to violate the prohibition on arbitrary detention by the UN Human Rights Committee.<sup>48</sup>

The Centre is located at a former WWII military base on Manus situated in Manus Province, one of the smallest of PNG's regional provinces. Manus suffers from high levels of unemployment, low levels of education, poor health metrics, endemic corruption, high levels of intra-community tensions and high levels of alcohol and betel nut abuse.<sup>49</sup> The Centre is approximately 40 minutes' drive from the nearest population centre, Lorengau, and the local population has been generally hostile toward the detainees and the Centre.<sup>50</sup> The operation of the Centre has been shrouded in secrecy and there is a limited amount of information that can be gleaned through official channels. Australian legislation makes disclosure of facts or information observed by employees or subcontractors working at the Centre a criminal offense punishable by harsh penalties.<sup>51</sup>

The United Nations High Commissioner for Refugees has reported that PNG has inadequate refugee processing and resettlement resources, and detainees are detained indefinitely as their prospects for resettlement remain uncertain.<sup>52</sup> A report by Amnesty International notes that detainees are forced to queue for several hours each day for food and hygiene supplies and are routinely exposed to the elements as the compound has little by way of shade or shelter and hats

<sup>46</sup> Amnesty International, 'This Is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (Report, December 2013) <[https://www.amnesty.org.au/wp-content/uploads/2016/09/Amnesty\\_International\\_Manus\\_Island\\_report-1.pdf](https://www.amnesty.org.au/wp-content/uploads/2016/09/Amnesty_International_Manus_Island_report-1.pdf)> archived at <<https://perma.cc/RC3S-7XBW>> ('*This Is Breaking People*').

<sup>47</sup> See, eg, the #BringThemHere campaign driven by the Asylum Seeker Resource Centre: Asylum Seeker Resource Centre, #BringThemHere <[https://www.amnesty.org.au/wp-content/uploads/2016/09/Amnesty\\_International\\_Manus\\_Island\\_report-1.pdf](https://www.amnesty.org.au/wp-content/uploads/2016/09/Amnesty_International_Manus_Island_report-1.pdf)> archived at <<https://perma.cc/MBH2-GUVM>>.

<sup>48</sup> See decisions of the UN Human Rights Committee: Human Rights Committee, *Views: Communication No 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/93 (30 April 1997) ('*A v Australia*'); Human Rights Committee, *Views: Communication No 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/99 (13 November 2002) ('*C v Australia*'); Human Rights Committee, *Views: Communication No 1014/2001*, 78<sup>th</sup> sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*'); Human Rights Committee, *Views: Communication No 1324/2004*, 88<sup>th</sup> sess, UN Doc CCPR/C/88/D/1324/2004 (31 October 2006) ('*Shafiq v Australia*'); Human Rights Committee, *Views: Communications Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90<sup>th</sup> sess, UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004 (11 September 2007) ('*Shams v Australia*'); Human Rights Committee, *Views: Communication No 1069/2002*, 79<sup>th</sup> sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) ('*Bakhtiyari v Australia*'); Human Rights Committee, *Views: Communication No 1050/2002*, 87<sup>th</sup> sess, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006) ('*D and E v Australia*').

<sup>49</sup> Majid Karami Kamasae, 'Fourth Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, S CI 2014 06770, 7 April 2017, [68].

<sup>50</sup> Senate Legal and Constitutional Affairs References Committee, above n 43, 13–14.

<sup>51</sup> *Australian Border Force Act 2015* (Cth) s 42.

<sup>52</sup> See the report of the 11–13 June 2013 monitoring visit of the United Nations High Commissioner for Refugees ('UNHCR') to Manus Island: UNHCR Regional Representative in Canberra, 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11–13 June 2013' (Report, 12 July 2013) <<http://www.unhcr.org/en-au/publications/legal/58117c1a7/unhcr-monitoring-visit-to-manus-island-papua-new-guinea-11-13-june-2013.html>> archived at <<https://perma.cc/E4WL-86BX>>.

and sunscreen are not provided as a matter of course.<sup>53</sup> While clothing is provided to detainees, shoes are not provided and must be specially requested. Sanitation is poor and in times of heavy rain, the compound smells of sewage. Sleeping conditions are cramped with little to no privacy. There have been reported shortages of potable water and the food served to detainees is often mouldy, expired or otherwise contaminated. Detainees are largely cut off from the outside world, with restrictions placed on telephone and internet access.<sup>54</sup> There is evidence that indefinite detention of the kind undertaken at the Centre causes severe and sometimes irreparable mental harm to detainees.<sup>55</sup>

Safety procedures at the Centre have proved inadequate, and there have been multiple incidents where detainees were subjected to physical and sexual abuse and threats of the same.<sup>56</sup> Medical services at the Centre, including mental health care, are poor.<sup>57</sup> In a well-publicised incident, 24 year old Hamid Kehazaei died of septicaemia from a minor shin injury because the Centre's medical facility had no supplies of the antibiotics required to treat the injury, and bureaucratic delays prevented Mr Kehazaei from being airlifted to Australia for treatment.<sup>58</sup> Many of the detainees suffer from post-traumatic stress and other psychological disorders, which are exacerbated by the detention conditions at the Centre, and there have been extreme rates of self-harm among the Centre's population.<sup>59</sup>

These detention conditions have been alleged to contravene IHR standards and to constitute crimes against humanity.<sup>60</sup> Further, documents originating from two of the corporate contractors who ran the operations and security at the Centre revealed that conduct of the centres and the poor conditions in which detainees were housed were, in part, directed at coercing detainees with

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<sup>53</sup> *This Is Breaking People*, above n 46, 6.

<sup>54</sup> These detention conditions are summarised in Amnesty International's 2013 report: see *This Is Breaking People*, above n 46, 6, 44.

<sup>55</sup> O'Brien, 'Extraterritorial Detention Contracting in Australia', above n 39, 335.

<sup>56</sup> See Tendayi E Achiume et al, 'The Situation in Nauru and Manus Island: Liability for Crimes Against Humanity in the Detention of Refugees and Asylum Seekers' (Communiqué to the Office of the Prosecutor of the International Criminal Court, 14 February 2017) 45–8 ('*The Situation in Nauru and Manus Island*').

<sup>57</sup> Behrouz Boochani, 'Manus Island's Appalling Health Care Record', *The Saturday Paper* (online), 16 April 2016 <<https://www.thesaturdaypaper.com.au/news/politics/2016/04/16/manus-islands-appalling-health-care-record/14607288003132>> archived at <<https://perma.cc/L8F8-C5UH>>.

<sup>58</sup> Ben Doherty, 'Hamid Kehazaei Death: Visa Delays Stalled Transfer of Gravely Ill Asylum Seeker' *The Guardian* (online), 9 December 2014 <<https://www.theguardian.com/australia-news/2014/dec/09/hamid-kehazaei-death-visa-delays-stalled-transfer-asylum-seeker>> archived at <<https://perma.cc/US4R-AKDN>>. A concession was made by the former Commissioner of the Australian Border Force ('ABF'), Roman Quaedvlieg, that medical transfers from Nauru were 'obstructed and thwarted' by the ABF: Ben Doherty, 'ABF "Obstructed" Medical Transfers from Nauru, Roman Quaedvlieg Admits' *The Guardian* (online), 26 April 2018 <<https://www.theguardian.com/australia-news/2018/apr/26/abf-obstructed-medical-transfers-from-nauru-roman-quaedvlieg-admits>> archived at <<https://perma.cc/GQ3L-Y55N>>.

<sup>59</sup> *The Situation in Nauru and Manus Island*, above n 56, 48–50.

<sup>60</sup> *This Is Breaking People*, above n 46, 3.

recognised refugee status into resettling in PNG and encouraging asylum seekers to abandon their claims for refugee status and return to their home countries.<sup>61</sup>

In February 2017, the Stanford Human Rights Clinic and the Global Legal Action Network supported by a group of prominent international law academics sent a communiqué ('the Communiqué') calling upon the Prosecutor of the International Criminal Court to investigate the situation in the offshore detention centres on Manus Island and Nauru,<sup>62</sup> stating facts and matters which it was argued provided a reasonable basis for the Prosecutor to find that Australian agents and personnel of their corporate partners had perpetrated crimes against humanity including unlawful imprisonment, torture, deportation, persecution and other inhumane acts. It remains to be seen whether the Office of the Prosecutor will move forward with an investigation, but in light of the broad jurisdiction and limited resources of the International Criminal Court, it seems unlikely that redress will be found through this avenue.

### C Civil Society Campaigns

Although Australia's policies of mandatory detention currently enjoy bipartisan support and a strong level of public approval, in recent years there has been a groundswell of activism in Australia centred around companies who profit from the conduct of Australia's privatised offshore detention centres. Refugee advocate groups have spoken out about conditions in the offshore detention centres in an effort to pressure government to change its policies. The #BringThemHere movement has raised the profile of the plight of asylum seekers in offshore detention,<sup>63</sup> and grassroots activist and civil society groups have applied pressure to corporate contractors who facilitate the detention infrastructure through boycotts.<sup>64</sup>

Activist organisations such as Get Up began to focus on divestment campaigns, partnering with No Business in Abuse to apply pressure on investors in Transfield,<sup>65</sup> one of the corporate service providers on Manus. These campaigns contributed to Hesta and other leading superannuation funds divesting

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<sup>61</sup> Behrouz Boochani, Ben Doherty and Nick Evershed, 'Revealed: Year-Long Campaign to Make Conditions Harsher for Manus Refugees', *The Guardian* (online), 17 May 2017 <<https://www.theguardian.com/australia-news/2017/may/17/revealed-year-long-campaign-to-make-conditions-harsher-for-manus-refugees>> archived at <<https://perma.cc/CNQ8-MR2Y>>.

<sup>62</sup> *The Situation in Nauru and Manus Island*, above n 56. An earlier referral alleging similar matters was made in 2014 by Andrew Wilkie, independent Member of the Australian Parliament: see Andrew Wilkie, *ICC Requested to Investigate Prosecution of Abbott Government* (22 October 2014) <<http://andrewwilkie.org/project/icc-requested-to-investigate-prosecution-of-abbott-government/>> archived at <<https://perma.cc/YGR2-VLVA>>.

<sup>63</sup> See Asylum Seeker Resource Centre, above n 47.

<sup>64</sup> One of the most prominent of these was an artist's boycott of the Sydney Biennale, a large arts festival supported by Transfield. The boycott was reported extensively in the Australian media and prompted the resignation of Luca Belgiorno-Nettis, then director of Transfield, from his position as chair of the Biennale: Alana Lentin and Javed de Costa, 'Sydney Biennale Boycott Victory Shows that Divestment Works', *The Guardian* (online), 11 March 2014 <<https://www.theguardian.com/commentisfree/2014/mar/11/sydney-biennale-boycott-victory-shows-that-divestment-works>> archived at <<https://perma.cc/2Y8L-7KHQ>>.

<sup>65</sup> Transfield was rebranded as Broadspectrum in 2015. See Broadspectrum, *History* (2018) <[www.broadspectrum.com/about/history](http://www.broadspectrum.com/about/history)> archived at <<https://perma.cc/C4T4-XHVG>>.

their shares in the company.<sup>66</sup> The campaign also targeted Transfield for alleged failure to disclose its contribution to human rights abuses in Manus and Nauru.<sup>67</sup>

All corporate contractors engaged to manage the Centre during the period the subject of the *Kamasae* litigation have committed to ending their involvement with Australia's offshore detention regime. Wilson Security, who were engaged by Broadspectrum to provide security services on Manus,<sup>68</sup> has announced that it would not provide further detention services to the Australian Government following the expiry of their current contract in October 2017.<sup>69</sup> Ferrovia, which acquired Broadspectrum in 2016, has also committed to ending its involvement amid warnings that it could be exposed to prosecution under international criminal law.<sup>70</sup> Despite the stated desire of Ferrovia to cease involvement, the Australian government unilaterally renewed Broadspectrum's contract, obliging it to continue the provision of services up to October 2017.<sup>71</sup> However, as this group of contractors steps out, others are taking their place. In October 2017, it was announced that engineering firm Canstruct International will be taking over the operations of the offshore detention centre on Nauru,<sup>72</sup> and accordingly has now been targeted by campaigns driven by Get Up and No Business in Abuse.<sup>73</sup>

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<sup>66</sup> ABC Radio National, 'Human Rights Group No Business in Abuse Steps Up Campaign against Transfield Services' *RN Breakfast*, 21 September 2015 (Fran Kelly) <<http://www.abc.net.au/radionational/programs/breakfast/2015-09-21/6790738>> archived at <<https://perma.cc/KQU9-KTLR>>.

<sup>67</sup> Paul Farrell 'Transfield Could Face Legal Action over Nauru and Manus Abuses, Group Warns' *The Guardian* (online), 20 September 2015 <<https://www.theguardian.com/australia-news/2015/sep/21/transfield-could-face-legal-action-over-nauru-and-manus-abuses-group-warns>> archived at <<https://perma.cc/4RG8-7B64>>.

<sup>68</sup> Prior to 2015 Broadspectrum was known as Transfield. See Broadspectrum, *History* (2018) <[www.broadspectrum.com/about/history](http://www.broadspectrum.com/about/history)> archived at <<https://perma.cc/NRG6-JXXT>>.

<sup>69</sup> Ben Doherty, 'Wilson Security to Withdraw from Australia's Offshore Detention Centres', *The Guardian* (online), 1 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/01/wilson-security-to-withdraw-from-australias-offshore-detention-centres>> archived at <<https://perma.cc/T4BC-GMYU>>.

<sup>70</sup> Ben Doherty and Patrick Kingsley, 'Refugee Camp Company in Australia "Liable for Crimes against Humanity"', *The Guardian* (online), 25 July 2016 <<https://www.theguardian.com/australia-news/2016/jul/25/ferrovial-staff-risk-prosecution-for-managing-australian-detention-camps>> archived at <<https://perma.cc/RT8B-R79W>>.

<sup>71</sup> Jenny Wiggins, 'Ferrovia Forced to Run Nauru, Manus Detention Centres until Late 2017', *Australian Financial Review* (online), 7 August 2016 <<https://www.afr.com/business/ferrovial-forced-to-run-nauru-manus-detention-centres-until-late-2017-20160805-gqlr2i>>.

<sup>72</sup> Helen Davidson 'Civil Engineering Firm Canstruct to Take Over Operating Nauru Detention Centre', *The Guardian* (online), 19 October 2017 <<https://www.theguardian.com/world/2017/oct/19/civil-engineering-firm-canstruct-to-take-over-operating-nauru-detention-centre>> archived at <<https://perma.cc/QXY8-V2UN>>.

<sup>73</sup> See Get Up's campaign page: Get Up, *Send Canstruct a Message: Back Out of Business in Abuse* (2018) <<https://www.getup.org.au/campaigns/refugees/another-nauru-contractor/send-canstruct-a-message-back-out-of-business-in-abuse>> archived at <<https://perma.cc/MWH3-3YTT>>.

Other corporate contractors have been engaged to provide services on Manus following the closure of the Centre.<sup>74</sup>

While these campaigns have been effective in influencing corporate behaviour, they do not address access to remedy, and have been largely unsuccessful in their efforts to shift government policy on the offshore detention regime.

#### D Contractual Arrangements and Corporate Contractors

The legal framework for the Centre is supplied by two *Memoranda of Understanding* ('MOUs') entered into between Australia and PNG in 2012<sup>75</sup> and 2013.<sup>76</sup>

Pursuant to the *MOUs*, PNG would host an 'Assessment Centre' for asylum seekers within its territory where asylum claims would be processed.<sup>77</sup> Australia would have an entitlement to transfer persons who 'travelled irregularly by sea to Australia', and had been 'intercepted at sea by the Australian authorities in the course of trying to reach Australia by irregular means' or were required to be transferred under Australian Law.<sup>78</sup> Australia was to bear all costs incurred under the *MOU*.<sup>79</sup>

The preambles to the *MOUs* acknowledged that both Australia and PNG were parties to the 1951 *Convention Relating to the Status of Refugees* and its 1967 *Protocol*.<sup>80</sup> Further, pursuant to the 'Guiding Principles' of the 2012 *MOU*, the parties acknowledged that '[a]ll activities undertaken in relation to this *MOU* will be conducted in accordance with international law and the international obligations of the respective Participant'.<sup>81</sup>

<sup>74</sup> Companies such as Paladin, JDA Wokman, Toll Group, NKW and International Health and Medical Services have apparently been contracted to provide services to the men on Manus following the closure of the Centre: Ben Doherty, 'Dutton Refuses Senate Order to Release Details of Refugee Service Contracts on Manus', *The Guardian* (online), 18 January 2018 <<https://www.theguardian.com/australia-news/2018/jan/18/dutton-refuses-senate-order-to-release-details-of-refugee-services-contracts-on-manus>> archived at <<https://perma.cc/N6CC-9R2N>>.

<sup>75</sup> *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*, signed 8 September 2012 <<http://www.kaldorcentre.unsw.edu.au/sites/default/files/MOU%201.pdf>> archived at <<https://perma.cc/DQD4-GF47>> ('2012 *MOU*').

<sup>76</sup> *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*, signed 6 August 2013 <<http://dfat.gov.au/geo/papua-new-guinea/Documents/joint-mou-20130806.pdf>> archived at <<https://perma.cc/BSR4-WHE3>> ('2013 *MOU*').

<sup>77</sup> 2012 *MOU* cl 12; 2013 *MOU* cl 11. Under the terms of the 2013 *MOU* the reference to 'Assessment Centre' was changed to 'Processing Centre'.

<sup>78</sup> 2012 *MOU* cl 11; 2013 *MOU* cl 10. The 2013 *MOU* includes provision for the transfer of persons 'authorised' under Australian law rather than 'required' per the terms of the 2012 *MOU* and includes provision for health, identity and security checks to be undertaken by Australia prior to transfer: cls 10(c), (d).

<sup>79</sup> 2012 *MOU* cl 7; 2013 *MOU* cl 6.

<sup>80</sup> See 2012 *MOU* Preamble; 2013 *MOU* Preamble.

<sup>81</sup> 2012 *MOU* cl 4. This was amended in the 2013 *MOU* to acknowledge only that each party 'will conduct all activities in respect of this *MOU* in accordance with its Constitution and all relevant domestic laws': 2013 *MOU* cls 4, 5.

The Centre was run in accordance with administrative arrangements agreed between PNG and Australia pursuant to which the Australian Government contracted with various service providers to provide garrison and security services, health and medical services, welfare support and interpreting services.<sup>82</sup>

Among the primary service providers were G4S Australia Pty Ltd ('G4S'), who were contracted by Australia to provide management and security services at the Centre between February 2013 and March 2014.<sup>83</sup>

In February 2014 during the period in which G4S was engaged to manage the Centre, the Centre was raided by 'police, guards and local people' ('the Raid').<sup>84</sup> During the Raid, many of the detainees were injured and a 23-year-old Iranian man, Reza Barati, died after a group of up to 15 men attacked him with a nail studded plank of wood and hit his head with a rock.<sup>85</sup>

The Raid was precipitated by mounting animosity towards the detainees in the local community.<sup>86</sup> Testimony before the Australian Senate Committee investigating the incident indicated that the violence was foreseeable, including testimony by a former G4S guard who stated that 'we knew this was going to end in violence'.<sup>87</sup>

Shortly after the Raid, the Human Rights Law Centre and Rights Accountability in Development jointly lodged a specific instance complaint against G4S with the Australian National Contact Point ('NCP') for the Organisation for Economic Co-Operation and Development ('OECD'),<sup>88</sup> established under the OECD Guidelines for Multinational Enterprises.<sup>89</sup> The complaint alleged that G4S had failed to maintain basic human rights standards including with respect to the Raid. The NCP found that it was unable to accept the matter on the basis that, inter alia: the NCP was not an appropriate vehicle to consider the implementation of Australian Government policy by G4S; a series of independent and Government reviews had already been undertaken and it was of the view that a further review by the NCP would be unlikely to add further value; and that legal proceedings, including *Kamasae*, were on foot, which may

<sup>82</sup> Senate Legal and Constitutional Affairs References Committee, above n 43, 21 [2.10].

<sup>83</sup> Commonwealth of Australia and G4S Australia Pty Ltd, 'Contract in Relation to the Provision of Services on Manus island (PNG)' (1 February 2013), reproduced in Department of Immigration and Border Protection, *Decision Record: FOI Request FA 14/03/00126* (15 May 2014) 13 <<https://www.homeaffairs.gov.au/AccessandAccountability/Documents/FOI/FA140300126.pdf>> archived at <<https://perma.cc/H6R9-2RAN>>.

<sup>84</sup> Senate Legal and Constitutional Affairs References Committee, above n 43, 71 [4.61].

<sup>85</sup> Matthew Abbott and Ben Doherty, 'Inside Manus: Life in Detention — A Photo Essay' *The Guardian* (online), 10 September 2016 <<https://www.theguardian.com/australia-news/ng-interactive/2016/sep/10/inside-manus-life-in-detention-a-photo-essay>> archived at <<https://perma.cc/4P8K-27A5>>.

<sup>86</sup> Senate Legal and Constitutional Affairs References Committee, above n 43, 51–2 [3.48].

<sup>87</sup> Senate Legal and Constitutional Affairs References Committee, above n 43, 53–4 [3.52].

<sup>88</sup> Complaints made to an Australian National Contact Point ('NCP') within the framework of the Organisation for Economic Co-operation and Development ('OECD') *Guidelines for Multinational Enterprises* are referred to as 'specific instances': Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises* (OECD Publishing, 2011) 68.

<sup>89</sup> Melissa Davey, 'Manus Security Firm, G4S, Responsible for February Violence, Says Law Centre', *The Guardian* (online), 23 September 2014 <<https://www.theguardian.com/world/2014/sep/23/manus-security-firm-g4s-responsible-for-february-violence-says-law-centre>> archived at <<https://perma.cc/CJ7V-9KNU>>.



decide G4S's legal liability.<sup>90</sup> The failure of the Australian NCP to consider this complaint was the subject of the first ever appeal to the OCED's Investment Committee challenging the handling of a complaint by an NCP.<sup>91</sup>

Following the Raid, the G4S contract was taken over by Broadspectrum, formerly known as Transfield Services Ltd ('Transfield'), which commenced the provision of services on 24 March 2014. Broadspectrum subcontracted security work to Wilson Security.<sup>92</sup>

### E *Kamasae v Commonwealth*

In 2014, Majeed Kamasae became the lead plaintiff in a class action suit in the Supreme Court of Victoria naming Australia as First Defendant. G4S and Transfield, among the Contracted Service Providers ('CPSs') engaged by the Australian Government, were the second and third defendants to the claim, and Wilson Security was joined as a third party. The matters outlined above in Parts IV(B) and (D) form the factual basis for the claims brought by the plaintiffs in the class action group to be decided under PNG law.<sup>93</sup>

Mr Kamasae is an Iranian national who attempted to travel to Australia from Indonesia for the purpose of seeking asylum or refugee status in Australia. The boat on which Mr Kamasae was travelling was intercepted by an Australian Naval vessel and he was taken into Australian custody. After being briefly detained in Australia, he was sent to Manus and detained in the Centre for approximately 11 months.<sup>94</sup>

The claim alleged that the management of the Centre was to be undertaken by a mix of PNG and Australian officials pursuant to agreed administrative arrangements in place between Australia and PNG. Australia had responsibility for the management of CPSs engaged to provide services at the Centre and for the provision of facilities for health, education, counselling, interpreters and other relevant services, and would establish a funding mechanism to meet all operating costs for any PNG officials associated with establishing the Centre.<sup>95</sup>

It was alleged that the detainees were detained at the Centre by or on behalf of Australia, and that management and maintenance of security at the Centre was

<sup>90</sup> Australian National Contact Point, 'Specific Instance — G4S Australia Pty Ltd' (Statement, 10 June 2015) <[https://cdn.tspace.gov.au/uploads/sites/112/2018/02/G4S\\_aus.pdf](https://cdn.tspace.gov.au/uploads/sites/112/2018/02/G4S_aus.pdf)> archived at <<https://perma.cc/LR72-EWPS>>.

<sup>91</sup> OECD Watch, *Civil Society Watchdog Challenges Australian Government's Handling of Complaint about Human Rights Abuses at Manus Island Asylum Centre* (24 November 2017) <<https://www.oecdwatch.org/remedy-campaign/civil-society-watchdog-appeals-australian-government2019s-handling-of-complaint-about-human-rights-abuses-at-manus-island-asylum-centre>> archived at <<https://perma.cc/36RJ-QT5W>>.

<sup>92</sup> Wilson Security, *Nauru and Manus Island Fact Sheet* <<https://www.wilsonsecurity.com.au/ourexprience/Documents/Nauru%20and%20Manus%20Island%20Fact%20Sheet.pdf#search=manus>> archived at <<https://perma.cc/LW4L-PSKU>>.

<sup>93</sup> Majid Karami Kamasae, 'Fourth Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, S CI 2014 06770, 7 April 2017, 17 [32].

<sup>94</sup> *Ibid* 4 [1].

<sup>95</sup> *Ibid* 11 [17].

done in discharge of services provided to Australia.<sup>96</sup> Each of these allegations were denied.<sup>97</sup>

The crux of the claim was that each of Australia, G4S and Transfield owed a duty of care to Mr Kamasae and the plaintiff group based on their practical control over: the Centre premises; the location of detainees within those premises; and the provision of services to the detainees including the provision of food, water, shelter and accommodation, medical and health care and physical security, whether directly or through subcontractors or agents.<sup>98</sup> The standard of care to be provided was alleged to be equivalent to that required in respect of persons held in immigration detention in Australia,<sup>99</sup> and included a duty to take reasonable care to avoid foreseeable harm to the detainees.<sup>100</sup> The existence of this duty was denied by Australia<sup>101</sup> and admitted by G4S and Transfield, but only to the extent that such a duty applied to the discharge of their contractual obligations.<sup>102</sup>

It was further alleged that each of Australia, G4S and Transfield knew that the detainees were likely to have travelled from war zones in circumstances of physical deprivation, hunger and fear; that they were likely to have suffered violence including torture, sexual violence and trauma; and were likely to have physical and psychological health conditions requiring medical treatment.<sup>103</sup> This level of knowledge was substantially admitted by each of the defendants.<sup>104</sup>

Australia, G4S and Transfield were alleged to have breached their duty to the plaintiffs by reason of the following:

- a) the conditions in which Mr Kamasae and the other detainees at the Centre were kept were unsanitary, provided little to no privacy, were crowded and exposed to the elements;<sup>105</sup>
- b) detainees were not given sufficient access to potable water and at times were given contaminated food;<sup>106</sup>

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<sup>96</sup> Ibid 5 [3(b)(ii)], 5 [4(b)].

<sup>97</sup> Commonwealth of Australia, 'Defence to the Third Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 19 September 2016, 4–5 [3], 5 [4(a)].

<sup>98</sup> Majid Karami Kamasae, 'Fourth Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 7 April 2017, pts E, J.

<sup>99</sup> Ibid 30 [52].

<sup>100</sup> Ibid 29 [49].

<sup>101</sup> Commonwealth of Australia, 'Defence to the Third Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 19 September 2016, 19 [49].

<sup>102</sup> G4S, 'Defence to the Plaintiff's Third Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 19 September 2016, 16–17 [49]; Transfield Services, 'Second Amended Defence and Counterclaim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 31 March 2017, 29–30 [141].

<sup>103</sup> Majid Karami Kamasae, 'Fourth Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 7 April 2017, 31–3 [55].

<sup>104</sup> Commonwealth of Australia, 'Defence to the Third Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 19 September 2016, 21–2 [55]; G4S, 'Defence to the Plaintiff's Third Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 19 September 2016, 18–19 [55]; Transfield Services, 'Second Amended Defence and Counterclaim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 31 March 2017, 31 [146].

<sup>105</sup> Majid Karami Kamasae, 'Fourth Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 7 April 2017, 51–8 [84]–[87], 120–6 [166]–[169].

<sup>106</sup> Ibid 48–51 [80]–[83], 117–20 [162]–[165].

- c) medical facilities were inadequate and the standard of care was poor. The medical centre at the Centre was unhygienic and understaffed, particularly with respect to psychiatric clinicians;<sup>107</sup>
- d) the internal security measures were inadequate with no processes for identifying and managing detainees who were violent or anti-social and did not adequately address instances of violence, bullying and harassment by security staff;<sup>108</sup> and
- e) the external security measures were inadequate to defend detainees from the local population which led, inter alia, to the incidents the subject of the Raid referred to in detail above.<sup>109</sup>

It was further alleged that Australia, G4S and Transfield knew that failure to provide adequate food, water, shelter, medical care and security would or may cause harm,<sup>110</sup> which would be exacerbated by prolonged detention.<sup>111</sup>

These allegations framed in negligence mirror the matters relied on in NGO reports alleging contraventions of IHR law<sup>112</sup> and those relied on in the Communiqué to support the views of its authors that the Australian Government and its corporate contractors could be prosecuted for crimes against humanity.<sup>113</sup>

Exemplary damages were sought against Australia and G4S on the basis of alleged contumelious regard for the rights of Mr Kamasae and the plaintiff group.<sup>114</sup>

#### F Settlement and Post-Settlement

On 14 July 2017, a settlement was reached between the parties. The settlement funds were to be allocated as between the class action group in accordance with a Settlement Distribution Scheme which took into account the length of time spent at the Centre, whether a member of the class was present at the Centre during certain specific incidents<sup>115</sup> and whether a member of the class suffered particular kinds of physical or psychological injuries.<sup>116</sup> The settlement was approved by the Court on 6 September 2017,<sup>117</sup> and although some had expressed concerns that dispersal of the funds may be difficult, particularly once

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<sup>107</sup> Ibid 58–69 [88]–[92], 126–35 [170]–[175].

<sup>108</sup> Ibid 69–74 [93]–[96], 135–40 [176]–[179].

<sup>109</sup> Ibid 74–80 [97]–[101].

<sup>110</sup> Ibid 33 [56], 109–10 [147].

<sup>111</sup> Ibid 34–6 [58], 110–11 [149].

<sup>112</sup> *This Is Breaking People*, above n 46.

<sup>113</sup> *The Situation in Nauru and Manus Island*, above n 56.

<sup>114</sup> Majid Karami Kamasae, ‘Fourth Amended Statement of Claim’, Submission in *Kamasae v Commonwealth*, S CI 2014 06770, 7 April 2017, 80–1 [102], 87 [110].

<sup>115</sup> Including the Raid referred to in Part IV(D) above.

<sup>116</sup> Notice of Proposed Settlement in *Kamasae v Commonwealth*, SCI 2014 06770, 7 July 2017.

<sup>117</sup> Ben Doherty, ‘Manus Island: Judge Approves \$70m Compensation for Detainees’, *The Guardian* (online), 6 September 2017 <<https://www.theguardian.com/australia-news/2017/sep/06/judge-approves-70m-compensation-for-manus-island-detainees>> archived at <<https://perma.cc/GCQ4-D86C>>.

members of the plaintiff group had left Manus,<sup>118</sup> as at 9 April 2018, 97 per cent of the settlement funds had been disbursed.<sup>119</sup>

While the settlement sum of AUD70 million (plus costs estimated at AUD20 million) has been made public, how that settlement sum is to be apportioned as between the defendants has been left at the discretion of the defendants, who have not made this information publicly available. Accordingly, it is not certain how much of the settlement monies are to be paid by the corporate contractor defendants, if any at all, meaning that the corporate defendants may have escaped financial liability.<sup>120</sup> It has been reported that some legal experts have assumed that Australia will bear all of the cost.<sup>121</sup>

However, the settlement means that although the precise legal contours are unclear, Australian businesses that carry on operations overseas in host jurisdictions still exist under a cloud of potential legal liability under the Australian legal system where their extraterritorial operations contravene human rights standards. Despite the fact that the matter was settled without admission of liability, it is likely that the publicity around the case and the quantum of the settlement may nonetheless have a deterrent effect on Australian businesses, encouraging industry-led compliance in the absence of formal regulation.

### G Closure of the Centre

In April 2016, the PNG Supreme Court found that the forceful detention of asylum seekers at the Centre was ‘unconstitutional and illegal’ and ordered the PNG and Australian Governments to take all necessary steps to end the detention of the asylum seekers.<sup>122</sup> The ruling caused shares in Broadspectrum, the then operator of the detention Centre, to be put into a trading halt.<sup>123</sup>

Although initially welcomed by refugee advocates, this decision was something of a pyrrhic victory. Following the decision, as PNG and Australia took steps to close the Centre, detainees were informed that they must settle elsewhere in PNG, return to their home countries or be forcibly removed from the Centre, in spite of Australia’s declared intention that detainees would be

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<sup>118</sup> Megan Neil, ‘Manus Deadline May Be Too Tight’, *Australian Associated Press* (online), 17 July 2017 <<https://nz.news.yahoo.com/manus-settlement-deadline-may-too-tight-012858258--spt.html>> archived at <<https://perma.cc/Z5E4-9MYW>>.

<sup>119</sup> See Slater & Gordon Lawyers, *Manus Island Class Action — Settlement Distribution Scheme Update* (2018) <<https://www.slatergordon.com.au/class-actions/current-class-actions/manus-island-class-action>> archived at <<https://perma.cc/9C2H-78S6>>.

<sup>120</sup> The terms of the proposed settlement that have been made publicly available are set out in the Notice of Proposed Settlement: Notice of Proposed Settlement in *Kamasae v Commonwealth*, S CI 2014 06770, 7 July 2017.

<sup>121</sup> Martin McKenzie-Murray, ‘The Wrong Kind of Settlement’, *The Saturday Paper* (online), 17 June 2017 <<https://www.thesaturdaypaper.com.au/news/politics/2017/06/17/the-wrong-kind-settlement/14976216004800>> archived at <<https://perma.cc/KHY4-3N7A>>.

<sup>122</sup> *Namah v Pato* [2016] PGSC 13, [72] (Kandakasi J).

<sup>123</sup> Helen Davidson and Ben Doherty, ‘Manus Island Detention Centre Operator’s Shares Placed in Trading Halt — As It Happened’, *The Guardian* (online), 28 April 2016 <<https://www.theguardian.com/australia-news/live/2016/apr/28/manus-island-detainees-are-australias-responsibility-png-says-live>> archived at <<https://perma.cc/YBH5-QKUQ>>.

resettled in third countries.<sup>124</sup> As the October 2017 deadline set by Australia for the closure of the for the Centre loomed, water and power were cut off, services ceased and detainees began a 24 day protest, refusing to leave the Centre following its closure on 31 October 2017 until there was a safe place for them to go.<sup>125</sup> Three sites, East Lorengau Refugee Transit Centre, West Lorengau Haus and Hillside Haus were established to accommodate the detainees following the closure of the Centre, but as at the date of closure, some were still under construction and unable to accommodate all of the detainees.<sup>126</sup> Credible allegations of police brutality and violence perpetrated by the local Manusian community against the detainees remaining in the Centre during efforts to clear the Centre after its closure were reported,<sup>127</sup> but denied by the Australian Minister for Immigration and Border Protection.<sup>128</sup> Australia continues to wind back health and other services provided to the men remaining on Manus.<sup>129</sup> As at 22 May 2018 at least seven men detained as part of Australia's offshore

<sup>124</sup> Ben Doherty, “No future for You Here”: Australia and PNG Push to Clear Out Manus Detainees’, *The Guardian* (online), 27 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/27/no-future-for-you-here-australia-and-png-push-to-clear-out-manus-detainees>> archived at <<https://perma.cc/8XGW-9UER>>.

<sup>125</sup> Ben Doherty, ‘Manus Protest: Refugees Block Police Entry by Lying on the Ground’, *The Guardian* (online), 4 August 2017 <<https://www.theguardian.com/australia-news/2017/aug/04/manus-protest-refugees-block-police-entry-by-lying-on-the-ground>> archived at <<https://perma.cc/8H99-TS3E>>; Ben Doherty, “‘There’ll Be a Big Tragedy’: Manus Deadlock Could Reach Breaking Point”, *The Guardian* (online), 6 August 2017 <<https://www.theguardian.com/australia-news/2017/aug/06/therell-be-a-big-tragedy-manus-deadlock-could-reach-breaking-point>> archived at <<https://perma.cc/YW7H-2MP4>>; Behrouz Boochani, ‘A Letter from Manus Island’, *The Saturday Paper* (online), 9 December 2017 <<https://www.thesaturdaypaper.com.au/news/politics/2017/12/09/letter-manus-island/15127380005617>> archived at <<https://perma.cc/EMT2-E7Q5>>; Michael Green, ‘No Exit: The Ongoing Abuses of Australia’s Refugee Policy’, *Harper’s Magazine* (online), July 2018 <<https://harpers.org/archive/2018/07/no-exit-australian-immigration-manus-island/>> archived at <<https://perma.cc/SW6T-LQTT>>.

<sup>126</sup> UNHCR Regional Representative in Canberra, ‘Medical Expert Mission Papua New Guinea: 10 to 16 November 2017’ (Report, 18 December 2017) 3 <<http://www.unhcr.org/en-au/publications/legal/5a3b0f317/unhcr-medical-expert-mission-to-papua-new-guinea-10-16-november-2017.html>> archived at <<https://perma.cc/BK4J-GAMZ>>.

<sup>127</sup> Ben Doherty, ‘Manus Island Police Use Long Metal Poles to Beat Refugees and Asylum Seekers’, *The Guardian* (online), 24 November 2017 <<https://www.theguardian.com/australia-news/2017/nov/24/manus-island-police-use-long-metal-poles-to-beat-refugees-and-asylum-seekers>> archived at <<https://perma.cc/4ELM-GQ47>>.

<sup>128</sup> Helen Davidson, “‘I Will Kill You’”: Video Contradicts Peter Dutton’s Claim Refugees Were Lying’, *The Guardian* (online), 11 December 2017 <<https://www.theguardian.com/australia-news/2017/dec/11/peter-dutton-accuses-manus-island-refugees-of-lying-about-being-threatened>> archived at <<https://perma.cc/46GW-7HR7>>.

<sup>129</sup> Helen Davidson, ‘Australia’s Cut to Healthcare on Manus Island “Inexplicable”, Amnesty Says’, *The Guardian* (online), 18 May 2018 <<https://www.theguardian.com/australia-news/2018/may/18/australias-cut-to-healthcare-on-manus-island-inexplicable-amnesty-says>> archived at <<https://perma.cc/P7VM-MS8M>>.

detention regime have died on Manus,<sup>130</sup> the latest death prompting a statement from the UN High Commissioner for Refugees Deputy Regional Representative calling for immediate action, stating: ‘with the passage of too many years and the withdrawal or reduction of essential services, the already critical situation for refugees most in need continues to deteriorate’.<sup>131</sup>

Resettlement prospects for the remaining men on Manus are bleak. Although a resettlement arrangement with Cambodia has been on foot for some time, Cambodia is an unsuitable jurisdiction for resettlement, lacking in social services capable of supporting refugees. To date only a handful of refugees have been resettled under the program, three of whom have since returned to their home countries.<sup>132</sup>

The future prospects for a resettlement deal brokered between Australia and the Obama Administration remain unknown following the change in government in the US in 2017.<sup>133</sup> Although a number of refugees on Manus have now been resettled in the US under the deal,<sup>134</sup> the resettlement prospects of those who remain in the Centre are uncertain. Although PNG has sought a deadline for Australia to resettle the men on Manus,<sup>135</sup> refugees not resettled in Cambodia or

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<sup>130</sup> Josh Butler, ‘Manus Island Refugee Dead after Road Incident’, *Ten Daily* (online), 22 May 2018 <<https://tendaily.com.au/news/a180522igm/manus-island-refugee-dead-after-road-incident-20180522>> archived at <<https://perma.cc/65WL-C52W>>. See also the Australian Border Deaths Database maintained by Monash University, which tracks, inter alia, deaths in offshore immigration detention: Border Crossing Observatory, *Australian Border Deaths Database* (15 June 2018) Monash University <<http://artsonline.monash.edu.au/thebordercrossingobservatory/researchoutputs/australian-border-deaths-database/>> archived at <<https://perma.cc/9KUT-HD7M>>.

<sup>131</sup> UNHCR Regional Representative in Canberra, ‘UNHCR Statement’ (Press Release, 22 May 2018) <<http://www.unhcr.org/en-au/news/press/2018/5/59d1db707/unhcr-statement.html>> archived at <<https://perma.cc/K5ZJ-ZZPH>>, quoting Nai Jit Lam, UNHCR’s Deputy Regional Representative in Canberra.

<sup>132</sup> Lindsay Murdoch and Michael Koziol, ‘Australia’s Cambodia Refugee Resettlement Plan “a Failure”’, *Sydney Morning Herald* (online), 3 April 2016 <<https://www.smh.com.au/world/australias-cambodia-refugee-resettlement-plan-a-failure-20160403-gnx3jv.html>> archived at <<https://perma.cc/VRB7-GWGY>>.

<sup>133</sup> Even if the arrangement is honoured, restrictions have been placed on resettlement of citizens of five Muslim-majority countries (Iran, Libya, Somalia, Syria and Yemen) pursuant to the ‘travel ban’ instituted by the Trump administration. To date, Iranian and Somali refugees held in Nauru have been rejected for resettlement in the US: Ben Doherty, ‘Australia’s Refugee Deal “a Farce” after US Rejects All Iranian and Somali Asylum Seekers’, *The Guardian* (online), 8 May 2018 <<https://www.theguardian.com/australia-news/2018/may/08/australias-refugee-deal-a-farce-after-us-rejects-all-iranian-and-somali-asylum-seekers>> archived at <<https://perma.cc/A4N7-HXH4>>.

<sup>134</sup> Ben Doherty, ‘Second Group of Manus Island Refugees Depart for US under Resettlement Deal’, *The Guardian* (online), 23 January 2018 <<https://www.theguardian.com/australia-news/2018/jan/23/second-group-of-manus-island-refugees-depart-for-us-under-resettlement-deal>> archived at <<https://perma.cc/NQ44-ADW4>>. As at 30 April 2018, 249 people had been resettled as part of the US deal, 84 from PNG and 165 from Nauru with 939 people remaining in Nauru, 716 in PNG: Commonwealth, *Parliamentary Debates*, Senate, 21 May 2018, 114 (Linda Geddes, Deputy Secretary, Policy, Department of Home Affairs).

<sup>135</sup> Eric Tlozek, ‘Manus Island: PNG Wants Australia to Put Deadline on Refugee Resettlement’, *ABC News* (online), 21 March 2018 <<http://www.abc.net.au/news/2018-03-21/australia-urged-to-put-deadline-on-manus-refugee-resettlement/9569258>> archived at <<https://perma.cc/JUS3-8PXT>>.

the US could remain in PNG,<sup>136</sup> which suffers from a similar lack of social services to Cambodia, making prospects of successful resettlement unlikely. Although a standing offer made by New Zealand in 2013 to resettle up to 150 people detained as part of Australia's offshore detention regime on Manus and Nauru remains open, to date this offer has not been accepted by the Australian government.<sup>137</sup>

In spite of the settlement, detainees part of the class action who remain in PNG are still living in conditions that are alleged to constitute violations of their human rights, and Australia remains in dereliction of its obligations toward them under international law.<sup>138</sup>

## V AUSTRALIA AS A FORUM FOR TRANSNATIONAL HUMAN RIGHTS LITIGATION

Unlike some other jurisdictions,<sup>139</sup> in Australia there is no direct cause of action for egregious violations of human rights standards, rather private causes of action based on human rights violations may be framed in tort whether as negligence, trespass, assault and battery or wrongful imprisonment claims.

Australian courts have developed an established body of jurisprudence that has set the parameters of jurisdiction over extraterritorial activities, rules to ascertain the applicable law and attendant procedural matters such as the availability of class action suits. The sum of these parts is a jurisdiction peculiarly receptive to transnational human rights litigation framed in tort, albeit one that is largely untested.<sup>140</sup>

Australia departs from most common law jurisdictions with respect to its rules on the doctrine of *forum non conveniens*. The Australian rule prescribes that cases will only be stayed on *forum non conveniens* grounds if Australia is a 'clearly inappropriate forum'.<sup>141</sup> This test was made even more restrictive with the decision in *Regie Nationale des Usines Renault SA v Zhang*,<sup>142</sup> in which the High Court held that a stay on *forum non conveniens* grounds would only be successful where to allow the trial to continue in Australia 'would be productive of injustice, ... oppressive in the sense of seriously and unfairly burdensome,

<sup>136</sup> Dan Conifer, 'Manus Refugees Not Accepted by US to Remain in PNG, Dutton Says', *ABC News* (online), 9 April 2017 <<http://www.abc.net.au/news/2017-04-09/refugees-not-accepted-by-us-to-remain-in-papua-new-guinea/8428780>> archived at <<https://perma.cc/YQ5T-J9H8>>.

<sup>137</sup> See Eleanor Ainge Roy 'Australia Asked New Zealand to Keep Refugee Offer on Table, Documents Show', *The Guardian* (online), 12 April 2018 <<https://www.theguardian.com/world/2018/apr/12/australia-wants-new-zealand-to-keep-refugee-offer-on-table-documents-show>> archived at <<https://perma.cc/4T4V-WPK7>>; 'NZ Says It's Australia's "Responsibility" to Block Detainee On-Travel', *SBS News* (online), 22 May 2018 <<https://www.sbs.com.au/news/nz-says-it-s-australia-s-responsibility-to-block-detainee-on-travel>> archived at <<https://perma.cc/UJ6C-RF3M>>.

<sup>138</sup> As at 22 May 2018, it was the view of UNHCR that 'Australia's responsibility for those who have sought its protection remains unchanged': UNHCR Regional Representative in Canberra, 'UNHCR Statement', above n 131.

<sup>139</sup> For example, the *Alien Tort Statute* in the US, which enables non-US citizens to bring suit in US courts based on certain violations of international law. However, as noted above, this is unlikely to be a useful future avenue for human rights litigation given the recent decision in *Jesner v Arab Bank plc*, which held that foreign corporations may not be defendants in *Alien Tort Statute* claims: see *Jesner v Arab Bank plc* (2<sup>nd</sup> Circ, No 16-499, 24 April 2018).

<sup>140</sup> See Joseph, above n 32, 122.

<sup>141</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

<sup>142</sup> *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ('Zhang').

prejudicial or damaging, or vexatious, in the sense of productive of serious and unjustified trouble and harassment'.<sup>143</sup>

Australia's approach to *forum non conveniens* has been the subject of considerable domestic<sup>144</sup> and international<sup>145</sup> criticism. Its defenders argue that 'far from being out of step with the demands of the modern interdependent world, Australia in fact has a more globally responsible *forum non conveniens* doctrine than the United States and the United Kingdom'.<sup>146</sup> Defenders of the Australian approach maintain that it helps the Australian legal system 'share some of the burden of resolving problems caused by its citizens and resident companies in foreign countries'.<sup>147</sup> As doctrines of *forum necessitatis* are beginning to gain acceptance<sup>148</sup> and traditional *forum non conveniens* rules are displaced,<sup>149</sup> the advantages of the approach taken by the Australian common law rule may yet find favour.

Australian courts have the authority to hear cases involving damage suffered partly within the jurisdiction in respect of a tort, wheresoever occurring, and permit service out of the jurisdiction in compliance with their respective court rules. The nexus requirements are interpreted leniently.<sup>150</sup> Further, foreign corporations are susceptible to the exercise of personal jurisdiction where they conduct business in Australia. Australian courts have taken a particularly

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<sup>143</sup> Ibid, 521 [78] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>144</sup> See, eg, Michael Pryles, 'Judicial Darkness in the Oceanic Sun' (1998) 62 *Australian Law Journal* 774.

<sup>145</sup> See, eg, Adrian Briggs, 'Wider Still and Wider: The Bounds of Australian Exorbitant Jurisdiction' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 216.

<sup>146</sup> Peter Prince, 'Bhopal, Bougainville and OK Tedi: Why Australia's *Forum Non Conveniens* Approach is Better' (1998) 47 *International and Comparative Law Quarterly* 573, 593. Australia's approach may seem less exorbitant in light of the fact that the traditional approach to *forum non conveniens* articulated in *Spiliada* requires that a more appropriate forum be identified as a precondition to dismissal on *forum non conveniens* grounds, a requirement that is unlikely to be satisfied in most transnational human rights claims. See *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 476:

The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, *i.e.* in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

<sup>147</sup> Prince, above n 146, 597.

<sup>148</sup> See, eg, *Van Breda v Village Resorts Ltd* (2010) 98 OR (3d) 721. The matter was appealed to the Supreme Court of Canada, however the Court did not consider the validity of the doctrine of *forum necessitatis* within the Canadian legal framework as it was not in issue in the appeal. See *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572, 606 [59], 615–16 [82], 617–18 [86], 622 [100].

<sup>149</sup> See, eg, *Owusu v Jackson* (C-281/02) [2005] ECR I-1445.

<sup>150</sup> See, eg, *Zhang* (2002) 210 CLR 491, in which a claimant injured in a motor accident in New Caledonia was able to bring an action in Australia against a French car manufacturer with no presence in Australia.



permissive approach to establishing presence in the jurisdiction,<sup>151</sup> and in practice it is not a significantly high threshold to overcome.

Despite this openness, there are a limited number of transnational human rights claims that have been brought in Australia, a notable exception, albeit one that concerned environmental damage, being *Dagi v Broken Hill Proprietary Co Ltd (No 2)*,<sup>152</sup> in which the Broken Hill Proprietary Company, now known as BHP, was sued in the Supreme Court of Victoria over damage alleged to have been caused by a mine it operated in Papua New Guinea. The case settled after a preliminary hearing for an undisclosed (but rumoured to be extremely significant) amount.<sup>153</sup>

Although Australian courts will apply the *lex loci delicti* principle strictly when determining the applicable law with no scope for a flexible exception,<sup>154</sup> there is a deal of flexibility around the test for determining where the relevant wrong has occurred.<sup>155</sup> While it will depend on the precise factual matrix, this flexibility gives scope to advantageously frame a claim through the characterisation process to advance a credible case for Australian law to apply. Even where foreign law is the applicable law, Australian Courts have shown themselves to be comfortable applying foreign law where it is pleaded and proved as a matter of fact, often by relying on expert evidence.<sup>156</sup> Where foreign law is not pleaded and proved, it will be assumed to be the same as the law of the forum.<sup>157</sup>

A further advantage is the availability of class action suits, which have been a part of Australia's legal landscape since their introduction in 1992,<sup>158</sup> although the number of class action suits has been relatively modest.<sup>159</sup> This mechanism utilises an 'opt out' model pursuant to which all potential plaintiffs within a defined class become members of the claimant class upon filing a claim brought by a representative claimant. 'Opt out' models are generally more advantageous

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<sup>151</sup> See *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725, 733–4: where the presence of local agents who collected investment cheques was held to be a sufficient connection in order for a foreign corporation to be relevantly present within the jurisdiction, even though the local agents had no discretion and no authority to do anything other than discharge instructions of the principal. See also *Commonwealth Bank of Australia v White* [1999] 2 VR 681, 691–2: where a foreign corporation was held to be carrying on business in Australia via a local subsidiary established for the purpose of promoting and dealing with enquiries regarding the foreign corporation.

<sup>152</sup> *Dagi* [1997] 1 VR 428.

<sup>153</sup> Reported details regarding the settlement include a AUD400 million sum allocated for the construction of a tailings containment system and AUD150 million for compensation for environmental damage. See Prince, above n 146, 595.

<sup>154</sup> *Zhang* (2002) 210 CLR 491, 520 [75] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>155</sup> See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 538 [81] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ): where the High Court noted the potential ambiguity or diversity of the place of the tort.

<sup>156</sup> See, eg, *Zhang* (2002) 210 CLR 491; *Nielson v Overseas Projects Corporation* (2005) 223 CLR 331.

<sup>157</sup> Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 8<sup>th</sup> ed, 2010) 351 [17.1].

<sup>158</sup> *Federal Court of Australia Act 1976* (Cth) pt IV, as inserted by *Federal Court of Australia Amendment Act 1991* (Cth) s 3.

<sup>159</sup> Justice Bernard Murphy, 'The Operation of the Australian Class Action Regime' (Paper presented at the Changing Face of Practice Conference, Brisbane, 2013) pt 5.1.

to prospective plaintiffs than ‘opt in’ models used in other jurisdictions,<sup>160</sup> as they omit the need for individual claimants within the class to be identified at the outset of proceedings.

Despite the features of the Australian jurisdiction outlined above that make it a favourable jurisdiction in which pursue transnational human rights litigation, there have been only a handful of any such cases brought in Australian courts,<sup>161</sup> none of which have proceeded to trial.<sup>162</sup>

The most significant barriers concern matters of funding and costs. Litigation that involves complex fact patterns with an extraterritorial component, novel legal issues, the possibility of having to plead and prove foreign law and a plaintiff group and relevant witnesses who may be in another jurisdiction is necessarily expensive. Further, Australian costs rules usually require an unsuccessful party to pay the successful party’s costs. In a ‘loser pays’ environment, claims like *Kamasae* can generally only be brought by plaintiff law firms who have the financial resources to assume a degree of financial risk.<sup>163</sup> However, there are moves to address the barriers to access to justice associated with funding issues by the establishment of litigation funds for public interest litigation.<sup>164</sup> Further, there has been considerable growth in the third party litigation funding<sup>165</sup> following the judicial approval of such mechanisms,<sup>166</sup> which may provide a solution where a claim is particularly attractive to a funder.

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<sup>160</sup> Such as the UK’s representative and group litigation processes: *Civil Procedure Rules 1998* (UK) SI 1998/3132, pt 19.

<sup>161</sup> This is particularly unusual given the number of companies in the extractive industries present in Australia who carry out operations overseas in weak governance zones. For an illustrative list of major oil and gas companies in Australia, see University of New South Wales School of Engineering, *Major Oil and Gas Companies in Australia* <<https://www.engineering.unsw.edu.au/petroleum-engineering/what-we-do/the-oil-and-gas-industry-in-australia/major-oil-and-gas-companies-in-australia>> archived at <<https://perma.cc/7A9Q-GWXP>>.

<sup>162</sup> *Dagi* [1997] 1 VR 428; *Pierre v Anvil Mining Management NL* [2008] WASC 30.

<sup>163</sup> It is reported that Slater & Gordon, solicitors for the plaintiffs in *Dagi* and *Kamasae*, used earnings from previous large settlements to bankroll the Ok Tedi litigation: see Stuart Kirsch, *Mining Capitalism: The Relationship between Corporations and Their Critics* (University of California Press, 2014) 89.

<sup>164</sup> Such as the Grata Fund, established in 2015. See Eliza Ginnivan and Isabelle Reinecke, *Grata Fund: Opening the Doors to Public Interest Litigation Australian Lawyers Alliance* (10 March 2016) Australian Lawyer’s Alliance <<https://www.lawyersalliance.com.au/opinion/grata-fund-opening-the-doors-to-public-interest-litigation>> archived at <<https://perma.cc/BG8T-2W4F>>. For a discussion of the chilling effect of loser pays provisions, see also Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, ‘The Third Pillar: Access to Judicial Remedies for Human Rights by Transnational Business’ (Report, International Corporate Accountability Roundtable, 4 December 2013) 68–73 <<https://www.icar.ngo/publications/2017/1/4/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business>> archived at <<https://perma.cc/RRE2-223A>>.

<sup>165</sup> For a discussion of trends in third party funding of class action suits, see Ashurst, *Class Actions in Australia* (9 March 2017) <<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---class-actions-in-australia/>> archived at <<https://perma.cc/7DUX-C2NL>>.

<sup>166</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 433–4 [88].

VI KAMASAE AND THE FUTURE OF TRANSNATIONAL HUMAN RIGHTS  
LITIGATION IN AUSTRALIA

The *Kamasae* action was a significant undertaking, reportedly involving over 50 court dates, 200 witnesses and 200 000 documents detailing the conditions at the Centre and incurring at least AUD20 million in costs.<sup>167</sup> It was billed as a means of piercing the veil of secrecy that shrouds Australia's offshore detention regime. As Slater & Gordon, the firm of solicitors representing the plaintiff group, described the case: 'This case will be the largest and most forensic public examination of the events and conditions at the Manus Island centre and reflects the unquestionable importance of access to justice in the Australian legal system'.<sup>168</sup>

To ensure transparency and further the aim of open justice, the hearings in *Kamasae* were to be live streamed via a link on the Victorian Supreme Court's website and made freely available not only to the Australian public, but also to the detainees on Manus, marking the first time that Australian court proceedings would be streamed live overseas.<sup>169</sup>

Post-settlement, the policy of secrecy has endured. Most recently, following the closure of the Centre, the Federal Government refused an order from the Australian Senate to release documents on the health, construction and security services provided for the men remaining on Manus, including details of contracts between the Australian Government and service providers.<sup>170</sup> Given the apparent value that the proceedings would have had to increase transparency and potentially secure a larger quantum of compensation, the fact that the matter settled for a relatively modest sum given the size of the plaintiff group and the magnitude of the allegations came as a surprise to some. As an editorial the *Sydney Morning Herald* described it: '[s]ecrecy is the only winner in the Manus Island court settlement', viewing the failure to take the matter to hearing as a missed opportunity.<sup>171</sup>

While the case presented an excellent opportunity to cast light on the conduct of the Centre and Australia's offshore detention regime more generally, a successful outcome was by no means assured. The plaintiff group managed to surmount a number of obstacles in bringing the case, including that of the cost of the litigation, easily the most significant barrier to accessing transnational human

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<sup>167</sup> Ben Doherty and Calla Wahlquist, 'Government to Pay \$70m Damages to 1,905 Manus Detainees in Class Action', *The Guardian* (online), 14 June 2017 <<https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action>> archived at <<https://perma.cc/6NFD-QCZP>>.

<sup>168</sup> Slater & Gordon Lawyers, 'Trial of Manus Island Class Action Nears' (Media Release, 21 February 2017) <<https://www.slatergordon.com.au/media/world-day-of-social-justice-trial-of-manus-island-class-action-nears>> archived at <<https://perma.cc/NHZ3-PWX7>>.

<sup>169</sup> Michael Gordon, 'Refugee Court Challenge to Be Streamed Live on Manus Island', *Sydney Morning Herald* (online), 9 April 2017 <<https://www.smh.com.au/politics/federal/refugee-court-challenge-to-be-streamed-live-on-manus-island-20170409-gvh0np.html>>.

<sup>170</sup> Including those with companies such as Paladin, JDA Wokman, Toll Group, NKW and International Health and Medical Services who have apparently been contracted to provide services to the men on Manus following the closure of the Centre: Doherty, 'Dutton Refuses Senate Order', above n 74.

<sup>171</sup> Editorial, 'Secrecy is the Only Winner in the Manus Island Court Settlement', *Sydney Morning Herald* (online), 15 June 2017 <<https://www.smh.com.au/national/secrecy-is-the-only-winner-in-manus-island-court-settlement-20170615-gwrpf3.html>>.

rights litigation under Australia's judicial system. However, the *Kamasae* claim faced a number of specific issues which may have made settlement an attractive option for the plaintiff group, in particular, the application of the act of state doctrine and Australia's strict *lex loci delicti* rule.

### A Act of State Doctrine

Australia limits sovereign immunity, having abrogated general immunity by operation of statute in all Australian states and territories and in the Commonwealth.<sup>172</sup> At the federal level, Crown<sup>173</sup> immunity from suit was abolished by the *Judiciary Act 1903* (Cth), making the executive generally susceptible to the same legal liabilities as ordinary citizens.<sup>174</sup> However, in certain circumstances, Australian courts will nonetheless decline jurisdiction to determine the legality of certain government acts under the 'act of state' doctrine.<sup>175</sup>

Although the doctrine cannot be pleaded with respect to any act done within Australian territory,<sup>176</sup> it may be pleaded as a bar to jurisdiction by 'any person who acted outside Australia under the orders of the Crown or whose action was authorised by it or subsequently ratified by it'.<sup>177</sup> Not every governmental act qualifies as an 'act of state', however, and the justiciability of a claim with respect to an act done by a government entity, or by a non-governmental entity acting under government orders, will turn on the nature of the act done.<sup>178</sup>

Given that the corporate contractors in the *Kamasae* case were acting in furtherance of Australian Government policy outside of Australian territory, there is a real question as to whether the plaintiff group's claims would have been barred by the operation of the act of state doctrine.

### B Lex Loci Delicti

While the application of the act of state doctrine was likely the most significant hurdle for the plaintiff group influencing the decision to settle, as noted above Australia adopts a strict *lex loci delicti* principle with no scope for a flexible exception. In *Kamasae*, there was no dispute between the parties that PNG law would be the applicable law in accordance with which the substantive

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<sup>172</sup> See Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (Law Book Company, 1982) 3–8.

<sup>173</sup> Under Australian law, the 'Crown' refers to 'the government and its myriad components': *ibid* 2.

<sup>174</sup> See *Judiciary Act 1903* (Cth) ss 56, 64. Arguably it has also been abolished by operation of s 75(iii) of the *Australian Constitution*. See Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 129 (2015) 432 [16.16].

<sup>175</sup> This issue bedevilled the claimants in *Dagi*, however in that case the doctrine was raised with respect to the acts of the PNG executive rather than the Australian executive abroad. See *Dagi* [1997] 1 VR 428, 453.

<sup>176</sup> See *Johnstone v Pedlar* [1921] 2 AC 262.

<sup>177</sup> See Martin Davies, Andrew Bell and Paul Le Gay Brereton, above n 157, 220 [10.69].

<sup>178</sup> *Lloyd Werft Bremerhaven GmbH v Owners of the Ship 'Zoya Kosmodemyanskaya' as Surrogate for the Ships 'Taras Shevchenko', 'Delphin' (Previously 'Kazakhstan II' Previously 'Byelorussiya') and 'Kazakhstan'* (Unreported, Federal Court of Australia, Tamberlin J, 15 May 1997) 30–2.

matters in the case would be determined.<sup>179</sup> PNG law recognises tort claims, including the tort of negligence,<sup>180</sup> such law being supplied by two sources: customary law, comprised of the customs and uses of the indigenous inhabitants of PNG; and common law, comprised of the principles of common law and equity of England in force as at the date of PNG independence, 16 September 1975.<sup>181</sup> The common law will apply except in so far as it is inappropriate to the circumstances of the country or has been abolished or modified by the PNG *Constitution* or legislation.<sup>182</sup> Accordingly, the *Kamasae* case would have been decided under ordinary tort principles, as in force in PNG. Close analysis of the particular features of PNG tort law applicable to the *Kamasae* claims is beyond the scope of this article. However, although it appears *prima facie* that Australia's strict *lex loci delicti* rule would not have been a significant impediment to this claim, it may be the case that the plaintiff group's claims would have been limited by operation of PNG legislation.<sup>183</sup>

### C Lessons for Future Transnational Human Rights Litigation

The 'problem of translation', by which the violation of a human rights norms may be translated into a civil cause of action, has been the subject of much discussion in the literature.<sup>184</sup> Framing human rights abuses as tort claims is a necessarily imperfect process, and will never mirror precisely the wrong done to an affected party as a result of a violation of their international human rights. However, in the absence of effective mechanisms that may facilitate access to remedy beyond existing judicial mechanisms, transnational human rights litigation, framed in tort, remains a powerful means of providing redress for such wrongs. Australia remains a viable jurisdiction in which such claims may be pursued.

It must be noted that particular features of the *Kamasae* case, concerning as it did the activities of corporate contractors acting in discharge of sensitive

<sup>179</sup> Majid Karami Kamasae, 'Fourth Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 7 April 2017, 17 [30]–[32]; Commonwealth of Australia, 'Defence to the Third Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 19 September 2016, 14 [31]; G4S, 'Defence to the Plaintiff's Third Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 19 September 2016, 6 [31]; Transfield Services, 'Second Amended Defence and Counterclaim', Submission in *Kamasae v Commonwealth*, S CI 2014 06770, 31 March 2017, 16 [31]. However, there was some dispute as to the effect of the *Wrongs (Miscellaneous Provisions) Act 1975* (Papua New Guinea). See Transfield Services, 'Second Amended Defence and Counterclaim', Submission in *Kamasae v Commonwealth*, SCI 2014 06770, 31 March 2017, 16–17 [32].

<sup>180</sup> See Stephen Offei, *Law of Torts in the South Pacific* (Vandeplas Publishing, 2<sup>nd</sup> ed, 2006) ch 4.

<sup>181</sup> See *Underlying Law Act 2000* (Papua New Guinea), pt II. See also Offei, above n 180, 12. For a discussion of the development of the PNG legal system, see generally Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (Intersentia, 4<sup>th</sup> ed, 2017).

<sup>182</sup> See *Underlying Law Act 2000* (Papua New Guinea), s 4.

<sup>183</sup> As was contended by Transfield: Transfield Services, 'Second Amended Defence and Counterclaim', Submission in *Kamasae v Commonwealth*, S CI 2014 06770, 31 March 2017, 16–17 [32]. See *Wrongs (Miscellaneous Provisions) Act 1975* (Papua New Guinea).

<sup>184</sup> See, eg, Craig Scott 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing, 2001) 45.

Australian Government policy, created specific challenges for the plaintiff group. These may well have proved fatal had the case progressed to trial. However, this will not necessarily be the case in future claims, which may have either no governmental involvement, or may concern the collaboration of Australian companies with foreign governments, raising related but distinct issues of sovereign immunity and non-justiciability.

Although it is unlikely to have presented a significant obstacle in the *Kamasae* case, Australia's strict approach to *lex loci delicti* may prove to be a difficulty for future claimants seeking to bring transnational human rights claims in tort in Australia where the place of the wrong occurs in a jurisdiction that does not recognise the desired cause of action. However, to say that this would necessarily be an obstacle in future claims would be purely speculative, as much depends on the precise factual matrix of any prospective claim.

Despite these potential challenges, the capacity for Australia to develop as a forum for transnational human rights litigation remains extant. As noted above, Australia's robust judicial system, expansive approach to establishing jurisdiction, including the limited capacity to stay proceedings on *forum non conveniens* grounds and availability of an 'opt out' class action regime makes it an attractive jurisdiction in which to pursue such claims.

## VII THIRD PILLAR REMEDY AND FIRST PILLAR OBLIGATION TO PROTECT

What the *Kamasae* case demonstrates is that transnational tort litigation can provide only a partial remedy and act as a partial deterrent where corporate actors are facilitating the discharge of government policy.

Although the features of the Australian legal system made claims against G4S and Transfield possible and exposed them to a risk of legal liability, the Australian Government has at various stages acted to protect its policy of offshore detention and shield its corporate contractors from liability, including declining to consider the complaint made to its NCP with respect to G4S. The settlement in *Kamasae* was reached with no admission of liability. Immediately following the settlement announcement, the then Minister for Immigration and Border Protection went to lengths to emphasise the non-admission of liability and former Prime Minister Tony Abbott decried it as a 'windfall for people who unfairly took advantage of our nation's generosity'.<sup>185</sup>

The matters the subject of *Kamasae* were largely if not entirely the product of Australian Government policy, and the settlement means that there is still no clarity regarding the legal limits on how Australia is entitled to conduct its offshore detention centres, and what its corporate contractors may do to facilitate its policy.<sup>186</sup> Many legal commentators view the settlement as a missed opportunity to both flesh out the law on liability for extraterritorial human rights

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<sup>185</sup> Daniel McCulloch, 'Dutton Shifts Blame for Manus Settlement', *The West Australian* (online), 14 June 2017 <<https://thewest.com.au/politics/dutton-shifts-blame-for-manus-settlement-ng-s-1737257>> archived at <<https://perma.cc/FT35-P2YH>>.

<sup>186</sup> Sangeetha Pillai, 'Offshore Detention: What the Landmark Settlement Fails to Resolve', *The Interpreter* (online), 15 June 2017 <<https://www.lowyinstitute.org/the-interpreter/offshore-detention-what-landmark-settlement-fails-resolve>> archived at <<https://perma.cc/QRQ6-8J8N>>.

abuses and to lift the veil of secrecy that remains draped over the offshore detention centres.<sup>187</sup>

The Australian Government has been acting with impunity with regard to its offshore processing, repeatedly ignoring local and international criticism of its detention practices. Following the release of a report of the UN's special rapporteur on torture, which found that Australia was violating the rights of asylum seekers in contravention of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>188</sup> former Prime Minister Tony Abbot declared that Australia was 'sick of being lectured to by the United Nations'.<sup>189</sup> As recently as 23 June 2018, Home Affairs Minister Peter Dutton held the position that Australians must guard against compassion towards refugees as it could undo the government's success in discouraging people smugglers, stating that 'the hard-won success of the last few years could be undone overnight by a single act of compassion in bringing 20 people from Manus to Australia'.<sup>190</sup>

The settlement allows the Australian Government to maintain the strict secrecy over its processes and in so doing safeguard its policy. Unless and until Australia brings its actions in line with the first pillar obligation to protect human rights required under the *UNGPs* and international law, members of the plaintiff group in *Kamasae* will not have access to adequate remedy in accordance with the third pillar, and the governance gap between the standards set out in the *UNGPs*, Australian state practice and the practice of Australian corporate actors will not be satisfactorily addressed.

## VIII CONCLUSION

Transnational tort litigation remains a vital tool to address corporate impunity, but it cannot do so in isolation. Although the Australian government has

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<sup>187</sup> McKenzie-Murray, above n 121.

<sup>188</sup> Juan E Méndez, *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*, UN GAOR, 28<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/28/68/Add.1 (5 March 2015) [16]–[31].

<sup>189</sup> Lisa Cox, 'Tony Abbott: Australians "Sick of Being Lectured to" by United Nations, after Report Finds Anti-Torture Breach', *Sydney Morning Herald* (online), 10 March 2015 <<https://www.smh.com.au/politics/federal/tony-abbott-australians-sick-of-being-lectured-to-by-united-nations-after-report-finds-antitorture-breach-20150309-13z3j0.html>>.

<sup>190</sup> Australian Associated Press, 'Aust in Danger Phase with Refugees: Dutton', *The Australian* (online), 23 June 2018 <<https://www.theaustralian.com.au/news/latest-news/aust-in-danger-phase-with-refugees-dutton/news-story/48232a7c94f5815e2520dca196d24bde>> archived at <<https://perma.cc/V9MZ-WV4B>>.

endorsed and taken some steps to recognise and implement the *UNGPs*,<sup>191</sup> the political tension around the issue of asylum seekers in Australia impedes both fulfilment of Australia's duty to protect and facilitation of access to effective remedy for the plaintiff group in *Kamasae*. Although the *Kamasae* case faced significant obstacles and ultimately resulted in settlement, Australia nonetheless remains a viable forum in which to pursue transnational human rights litigation should the right case present itself.

While financial settlement is welcome and the prosecution of civil claims against private actors remains a powerful tool to remedy human rights abuses, the ongoing humanitarian situation on Manus and the lack of certainty around resettlement prospects reveals the crucial importance of state support if the third pillar is to be implemented in a substantive way and appropriate remedy obtained. As one human rights lawyer commenting on the case put it, 'signing a cheque for the injustices of yesterday doesn't help the injustices of tomorrow'.<sup>192</sup> The power to ensure that the human rights of the men remaining on Manus are not breached further lies almost exclusively with the Australian Government following the settlement of *Kamasae*.

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<sup>191</sup> The Australian government announced that it would be 'undertaking national consultation on the implementation of the *UN Guiding Principles on Business and Human Rights* during 2016'. See Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia — Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, 31<sup>st</sup> sess, Agenda Item 6, A/HRC/31/14/Add.1 (29 February 2016) [63]. A Multi-Stakeholder Advisory Group on the Implementation of the *UN Guiding Principles on Business and Human Rights* was established on 2 June 2017 by the Department of Foreign Affairs and Trade. See Minister for Foreign Affairs, 'Establishment of an Advisory Group on Business and Human Rights' (Media Release, 2 June 2017) <[https://foreignminister.gov.au/releases/Pages/2017/jb\\_mr\\_170602b.aspx](https://foreignminister.gov.au/releases/Pages/2017/jb_mr_170602b.aspx)> archived at <<https://perma.cc/5SEW-RR6B>>. The recommendations were released to the Australian government in August 2017. See Multi-Stakeholder Advisory Group on the Implementation of the *UN Guiding Principles on Business and Human Rights*, 'Advice on the Prioritisation of Issues and Actions to Implement the *UN Guiding Principles on Business and Human Rights* (*UNGPs*)' (Priorities Paper, August 2017) <<http://dfat.gov.au/international-relations/themes/human-rights/business/Documents/final-msag-priorities-paper.pdf>> archived at <<https://perma.cc/6HC3-RA52>>. In October 2017, the Australian government elected not to proceed with implementing a National Action Plan on business and human rights, contrary to the advice of the Advisory Group: Human Rights Law Centre, 'Government Ignores Advice of Expert Group on Business and Human Rights' (Media Release, 18 October 2018) <<https://www.hrlc.org.au/news/2017/10/17/government-ignores-advice-of-expert-group-on-business-and-human-rights>> archived at <<https://perma.cc/2M5D-6VUZ>>.

<sup>192</sup> McKenzie-Murray, above n 121, quoting Daniel Webb, a Director of the Human Rights Law Centre.