

ARTICLE

# A Topographical Approach to Accountability for Human Rights Violations in Migration Control

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## Abstract

This Article develops what we call a “topographical approach” to accountability in migration control. Drawing on different strands of scholarship, including legal geography, “legal black holes,” and work on strategic litigation, we approach accountability by perceiving the site of a violation from a bird’s-eye view and mapping different accountability structures across diverse legal regimes and via a broadened geographic lens. Rather than advocating for accountability in regard to particular regimes or jurisdictions, we argue that multi-pronged approaches are likely to remain the best starting point for ensuring accountability for human rights violations in the context of current migration control practices. The topographical approach thus offers a general framework for identifying existing blind spots, critically assessing existing trajectories, as well as exploring the wider grid of potential accountability mechanisms.

**Keywords:** Asylum; accountability; migration control; strategic litigation; human rights

## A. Introduction: Topography and Migration Control

Since the end of the Cold War, migration control has emerged as the principal response of Global North states to refugees and irregular migrants.<sup>1</sup> Billions of dollars and euros are spent each year on border patrols, technological surveillance systems, warning campaigns, and international agreements to stop or deter migrants and refugees.<sup>2</sup> In Europe, the 2015 migrant and refugee protection crisis alone has prompted a tripling of the EU budget allocated to border and migration management.<sup>3</sup> Meanwhile, the means and agreements through which these policies are

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<sup>1</sup>Thomas Spijkerboer, *The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control*, 20 EUR. J. MIGRATION & L. 452 (2018); Thomas Gammeltoft-Hansen & Nikolas Feith Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, 5 J. MIGRATION & HUM. SECURITY 28 (2017).

<sup>2</sup>*The Cost of Immigration Enforcement and Border Security*, AMERICAN IMMIGRATION COUNCIL (Oct. 14, 2019), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security>. See generally Thomas Gammeltoft-Hansen, *Private Security and the Migration Control Industry*, in ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES 207 (Rita Abrahamsen & Anna Leander eds., 2015).

<sup>3</sup>The current EU budget proposal for the period 2021–27 is €34.9 billion, compared to €13 billion for the period 2014–20. *EU Budget for the Future: Border Management*, COM (2018) 473, 474 (June 12, 2018).

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implemented have become both more operationally sophisticated and legally complex,<sup>4</sup> and, though data collection in this area remains difficult, arguably also more brutal in their consequences for the refugees and irregular migrants affected.<sup>5</sup>

The systematic lack of accountability pertaining to the spread of migration control and other deterrence measures has been contested by both scholars and practitioners. As Cathryn Costello recently noted, “lack of legal access to asylum for refugees has been perhaps the single most prominent topic in refugee studies for the past three decades.”<sup>6</sup> The legal discipline, in particular, has served as a laboratory for developing—and sometimes testing—principled challenges to deterrence and migration control policies.<sup>7</sup> While early scholarship tended to focus on the refugee law regime itself, more recent studies often adopt a broader human rights framework<sup>8</sup> or look to regional regimes such as EU law.<sup>9</sup> Similarly, as several other contributions to this Special Issue testify, a range of scholarship has developed that more directly explores particular accountability mechanisms and arguments in relation to specialized regimes at the domestic, regional, and international levels.

From a more practice-oriented perspective, successful litigation has, in several instances, forced governments to either abandon or substantially alter their policies.<sup>10</sup> The last decades have seen a remarkable increase in international case law concerning refugee and migrant rights in the context of migration control. The approach to migrant rights by judicial institutions, however, often remains ambivalent, and their role in this area has faced repeated criticism from prospective asylum states.<sup>11</sup> Moreover, the effect of successful litigation in regard to migration control and deterrence policies is often limited by successive policy developments specifically designed to eclipse existing precedent.<sup>12</sup> The result, as the editors to this Special Issue point out, is continued

<sup>4</sup>Violeta Moreno-Lax & Mariegiulia Giuffrè, *The Rise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Migratory Flows*, in RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW 82 (Satvinder Singh Juss ed., 2019); Asher Lazarus Hirsch, *The Borders Beyond the Border: Australia’s Extraterritorial Migration Controls*, 36 REFUGEE SURV. Q. 48 (2017); Thomas Gammeltoft-Hansen, *International Refugee Law and Refugee Policy: The Case of Deterrence Policies*, 27 J. REFUGEE STUD. 574 (2014).

<sup>5</sup>Tamara Last, *What is the Relationship between EU Border Deaths and Policy? Conflicting Hypotheses from Academics and Policymakers* (2018) (Ph.D. thesis, VU University); Agnes Callamard (Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions), *Unlawful Death of Refugees and Migrants*, U.N. Doc. A/72/335 (Aug. 15, 2017); Thomas Spijkerboer, *The Human Costs of Border Control*, 9 EUR. J. MIGRATION & L. 127 (2007).

<sup>6</sup>Cathryn Costello, *Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?*, 30 INT’L J. REFUGEE L. 643, 646 (2018).

<sup>7</sup>Rosemary Byrne & Thomas Gammeltoft-Hansen, *International Refugee Law between Scholarship and Practice*, 32 INT’L J. REFUGEE L. (forthcoming 2020).

<sup>8</sup>For example, see ITAMAR MANN, *HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW* (2016); MAARTEN DEN HEIJER, *EUROPE AND EXTRATERRITORIAL ASYLUM* (2012); THOMAS GAMMELTOFT-HANSEN, *ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL* (2011). On the human rights turn in migration law, see generally RUTH RUBIO-MARIN, *HUMAN RIGHTS AND IMMIGRATION* (2014).

<sup>9</sup>CATHRYN COSTELLO, *THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES IN EUROPEAN LAW* (2015); VIOLETA MORENO-LAX, *ACCESSING ASYLUM IN EUROPE: EXTRATERRITORIAL BORDER CONTROLS AND REFUGEE RIGHTS UNDER EU LAW* (2017).

<sup>10</sup>For example, see *Amuur v. France*, App. No. 19776/92 (June 25, 1996), <http://hudoc.echr.coe.int/eng?i=001-57988>; *Plaintiff M70/2011 v. Minister for Immigration and Citizenship* [2011] HCA 32 (Austl.); *Plaintiff M106/2011 v. Minister for Immigration and Citizenship* [2011] 32 (Austl.); *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 (Feb. 23, 2012), <http://hudoc.echr.coe.int/eng?i=001-109231>; Thomas Gammeltoft-Hansen, *International Refugee Law and Refugee Policy: The Case of Deterrence Policies*, 27 J. REFUGEE STUD. 574 (2014).

<sup>11</sup>MORITZ BAUMGÄRTEL, *DEMANDING RIGHTS: EUROPE’S SUPRANATIONAL COURTS AND THE DILEMMA OF MIGRANT VULNERABILITY* (2019). States have moreover actively sought to limit the role of international courts in this area. Paragraph 26 of the *Council of Europe Draft Copenhagen Declaration* specifically asked the European Court of Human Rights to consider the effectiveness of domestic procedures in cases concerning asylum and immigration and, “where these are seen to operate fairly and with respect for human rights, avoid intervening except in the most exceptional circumstances.” This paragraph was ultimately dropped from the final text but sent a fairly clear signal as to where Member States would like to see the Court apply a wider margin of appreciation. Comm. of Ministers of the Council of Europe, *Draft Copenhagen Declaration* (Feb. 5, 2018).

<sup>12</sup>Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013*, 54 HARV. INT’L L.J. 315 (2013); Thomas Gammeltoft-Hansen, “Creative Legal Thinking” and the Evolution of International Refugee Law, 14 LAKIMIES 99

accountability gaps.<sup>13</sup> More fundamentally, constant evolution in terms of state practice means that migration lawyers are forced to play catch up, and today's legal challenges in this area are often at the vanguard of broader legal debates regarding transnational or shared responsibility.

In line with the editors, we believe that this is a particularly important time to reflect on the trajectory and current state of scholarship and practice in this area. More specifically, we argue that in order to break with this problematic dynamic between politics and law, we need not only to enhance existing avenues for accountability, but also to think about and open up new ways through which to challenge contemporary practices of migration control. The principal purpose of the present Article is thus methodological. It sets out the core tenets of what we call a "topographical approach" to accountability in migration control, explores its theoretical underpinnings, maps its contours, and suggests its application.

We have coined the term "topographical" to convey an approach in which the site of a violation is perceived from a bird's-eye view and accountability pursued through diverse legal regimes and via a broadened geographic lens. This mapping of overlapping liabilities helps bring attention to legal regimes, adjudicatory forums, and jurisdictions traditionally overlooked or less explored in the context of migration control. It also opens up a process through which multiple options may usefully be pursued simultaneously, creating mutually reinforcing inroads to accountability, that, if successful, makes it harder for deterrence states to simply adjust or adapt their policies to the latest legal precedent. In so doing, the topographical approach both draws on emerging tendencies in litigation practices and scholarship and envisions a coherent framework for accountability strategies going forward.

Our approach is aimed at the broad set of situations in which complex arrangements cloud questions of responsibility and liability, either by virtue of cooperation between states and other actors,<sup>14</sup> questions of extraterritoriality,<sup>15</sup> or a combination of both of these factors.<sup>16</sup> Accountability, in this context, refers to the adjudication of violations by judicial or quasijudicial bodies accessible to asylum seekers and refugees. In this sense, we are focused on legal accountability for breaches of human rights obligations. Nevertheless, we acknowledge that there are overlaps between legal and political forms of accountability, particularly where complaints take on a high public profile or take place in non-binding settings.<sup>17</sup> We take a deliberately broad view of remedies, concerned with legal reparation and redress for human rights breaches under a range of legal systems not limited to human rights or refugee law.<sup>18</sup> Thus, while the topographical approach

(2014). See generally HUMAN RIGHTS AND THE DARK SIDE OF GLOBALIZATION: TRANSNATIONAL LAW ENFORCEMENT AND MIGRATION CONTROL (Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen eds., 2016).

<sup>13</sup>See Cathryn Costello & Itamar Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, in this issue.

<sup>14</sup>Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235 (2014); André Nollkaemper, *Shared Responsibility for Human Rights Violations: A Relational Account*, in HUMAN RIGHTS AND THE DARK SIDE OF GLOBALISATION: TRANSNATIONAL LAW ENFORCEMENT AND MIGRATION CONTROL 27 (Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen eds., 2016); Nora Markard, *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries*, 27 EUR. J. INT'L L. 591 (2016).

<sup>15</sup>DEN HEIJER, *supra* note 8; EXTRATERRITORIAL IMMIGRATION CONTROL (Bernard Ryan & Valsamis Mitsilegas eds., 2010); Hemme Battjes, *Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 2016, 263 (Martin Kuijer & Wouter Werner eds., 2017).

<sup>16</sup>Moreno-Lax & Giuffré, *supra* note 4; Hirsch, *supra* note 4; GAMMELTOFT-HANSEN, *supra* note 8.

<sup>17</sup>Michael Ramsden & Kris Gledhill, *Defining Strategic Litigation*, CIV. JUST. Q. (forthcoming). FitzGerald describes "accountability politics" as the use of information to "embarrass governments into changing their policies by exposing gaps between governments' stated interests and their practices." DAVID SCOTT FITZGERALD, *REFUGEE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS* 52–53 (2019).

<sup>18</sup>In the context of human rights law, of course, remedies refer to "the range of measures that may be taken in response to an actual or threatened violation." DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 4 (1999).

is anchored in breaches of human rights law, it opens up remedies from diverse legal regimes and geographic regions.<sup>19</sup>

The topographical approach does not claim to fill all accountability gaps for breaches of human rights in the course of migration control. Some violations in this context may ultimately remain beyond the pale of the law, leaving asylum seekers and refugees in a situation of *de jure* or *de facto* rightlessness.<sup>20</sup> The topographical approach, however, is an attempt to narrow the circumstances in which such rightlessness arises.

This Article proceeds in three sections. First, in Part B, we set out the theoretical underpinnings of a topographical approach, informed by insights from legal geography, as well as by literature on legal black holes and strategic litigation. Second, in Part C, we point to the application of the topographical approach in practice, drawing on existing examples and scholarship to map accountability across regimes and jurisdictions. Third, and finally, in Part D, we apply the topographical approach retrospectively with reference to one instantiation of migration control, namely Australia's regional processing center (RPC) on Manus Island, Papua New Guinea.

## B. Assembling a Topographical Methodology

Topography is concerned with the study of creating maps.<sup>21</sup> More specifically, a topographical approach to law has been referred to within legal geography as attention to distinctions of legal space that “constrain what kinds of practices of statecraft can be applied to which kinds of spaces.”<sup>22</sup> A leading legal geography scholar, Nicholas Blomley, specifically refers to refugees in defining a “splice” as the entanglement of space and law.<sup>23</sup> To refugee and migration lawyers, these territorial strategies are all too familiar: Complex migration control practices present legal difficulties precisely because they challenge the still-dominant assumption of territorial jurisdiction and responsibility.<sup>24</sup>

Within legal geography, topographical studies commonly focus on domestic settings, exploring tensions between, for example, public and private spaces,<sup>25</sup> and property rights.<sup>26</sup> Increasingly, however, legal geographers are turning their attention to transnational phenomena. Bruce D’Arcus, for example, invokes the “spatial architecture of law” to explain the use of extraordinary rendition in the course of the War on Terror.<sup>27</sup> The current use of “forensic architecture” as a method to produce evidence for use in juridical and political fora investigating violations is a further example of the application of spatial methods to human rights accountability.<sup>28</sup>

In keeping with the “spatial turn” in legal theory,<sup>29</sup> a topographical approach draws from legal geography’s focus on perceiving breaches of human rights law as a *site*.<sup>30</sup> In legal geography,

<sup>19</sup>Gabrielle Holly, *Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: Kamasae v Commonwealth*, 19 MELB. J. INT’L L. 52 (2018).

<sup>20</sup>*On de jure rightlessness*, see Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 EUR. J. INT’L L. 347 (2017).

<sup>21</sup>SABINE MÜLLER-MALL, *LEGAL SPACES: TOWARDS A TOPOLOGICAL THINKING OF LAW* 83 (2013).

<sup>22</sup>Bruce D’Arcus, *Extraordinary Rendition, Law and the Spatial Architecture of Rights*, 13 ACME 79, 83 (2014).

<sup>23</sup>Nicholas Blomley, *From ‘What’ to ‘So What’: Law and Geography in Retrospect*, in *LAW AND GEOGRAPHY* (Jane Holder & Carolyn Harrison eds., 2003).

<sup>24</sup>SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006).

<sup>25</sup>MARGARET KOHN, *BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE* (2004).

<sup>26</sup>Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid*, 93 ANNALS ASS’N AM. GEOGRAPHERS 121 (2003).

<sup>27</sup>D’Arcus, *supra* note 22.

<sup>28</sup>EYAL WEIZMAN, *FORENSIC ARCHITECTURE: VIOLENCE AT THE THRESHOLD OF DETECTABILITY* 9 (2017). See *FORENSIC ARCHITECTURE*, <https://forensic-architecture.org/> (last visited Feb. 5, 2020).

<sup>29</sup>Yishai Blank & Issachar Rosen-Zvi, *The Spatial Turn in Legal Theory*, 10 HAGAR: STUD. CULTURE POLITY & IDENTITY (2010).

<sup>30</sup>According to Bennett and Layard, “the spatial, the social and the legal are braided together to produce ‘sites.’” Luke Bennett & Antonia Layard, *Legal Geography: Becoming Spatial Detectives*, 9 GEOGRAPHY COMPASS 406, 409 (2015).

investigation tends to be “from the site up,”<sup>31</sup> situating the point of departure in “mundane sites” rather than the text of the law.<sup>32</sup> The “site,” in our context, is both a place and a space.<sup>33</sup> It refers, in the first instance, to the geographical location(s) in which a violation, or more likely, a set of violations have occurred. It refers, in the second instance, to the normative structures that imbue these violations with legal meaning. The topography with which we are concerned is thus not one of geographical distinctions or physical proximity, but rather the national and transnational legal architecture that is established by linking violations to different legal frameworks and accountability mechanisms. How we, as lawyers, understand what violations have occurred and define responsibility invariably points back to our construction of this legal topography. Just as Bennett and Layard call on legal geographers to become “spatial detectives” by investigating how the law relates to physical places,<sup>34</sup> a topographical approach to accountability in migration control requires the charting of uncertain legal terrain where new accountability linkages may be established.

This reorientation has important implications for how to frame and approach accountability in regard to migration control practices. First, it suggests breaking with regime specific approaches, in which accountability is considered from a singular legal vantage point. The evolution of approaches to accountability for migration control suggests a particular trajectory, in which human rights law, and more recently general international law, has come to bolster interpretation within international refugee law as the core legal regime governing people on the move in need of protection. Recently, a group of scholars criticized what they consider to be a “refugee paradigm” within international law.<sup>35</sup> In its place, they call for a more “migrant-centered perspective” exploring the fragmented legal spaces beyond the Refugee Convention and including all levels of law, whether at the “international, regional, bilateral, transnational [or] national” level.<sup>36</sup>

Second, a topographical approach requires us to critically reflect on and reassess our analytical outlook and presumptions. Scholars and advocates within this field—present authors included—often apply an implicitly *horizontal* perspective, seeking to stretch the reach of rights protections from a core towards the periphery. Terms such as “externalization,” “protection elsewhere,” “offshoring,” and “outsourcing” all place sponsoring states in the Global North at the center, notwithstanding the involvement of other states within this external dimension or simply elsewhere. This has the unfortunate side effect of excluding from view not only the concomitant responsibility of transit and origin countries, who are increasingly tasked with implementing migration controls, but also—and perhaps even more importantly—the accountability structures available within these jurisdictions.<sup>37</sup> In contrast, a topographical approach seeks to widen the lens of the inquiry to perceive the site from a bird’s-eye view vantage point to take in the full set of legal and accountability architectures on offer.<sup>38</sup>

<sup>31</sup>*Id.* at 410.

<sup>32</sup>*Id.* at 413. As in migration control, complexity is a recurring theme in legal geography, with a focus on “contradictions, gaps, and slippages” in the relationship between law and space. See David Delaney, *Legal Geography I: Constitutivities, Complexities, and Contingencies*, 39 *PROG. HUM. GEOGRAPHY* 96 (2015).

<sup>33</sup>John Agnew, *Space and Place*, in *HANDBOOK OF GEOGRAPHICAL KNOWLEDGE* 316 (John Agnew & David Livingstone eds., 2011).

<sup>34</sup>Bennett & Layard, *supra* note 30.

<sup>35</sup>Jaya Ramji-Nogales, *Moving Beyond the Refugee Law Paradigm*, 111 *AJIL UNBOUND* 8 (2017); Peter Spiro, *The Possibilities of Global Migration Law*, 111 *AJIL UNBOUND* 3 (2017).

<sup>36</sup>Jaya Ramji-Nogales & Peter Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 *AJIL UNBOUND* 1 (2017). See generally *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* (Margaret Young ed. 2012).

<sup>37</sup>GAMMELTOFT-HANSEN, *supra* note 8. Similarly, the public-private divide, still pervasive in both domestic and international law, has tended to impede discussions of shared or concomitant responsibility of states and corporate actors involved in migration control. Thomas Gammeltoft-Hansen, *Private Actor Involvement in Migration Management*, in *THE PRACTICE OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW* (André Nollkaemper & Ilias Plakokefalos eds., 2017).

<sup>38</sup>See Delaney, *supra* note 32, at 99–100.

As a second source of inspiration, the topographical approach draws on the study of rightlessness and legal black holes.<sup>39</sup> The concept of rightlessness, emerging from Arendt's seminal thesis, has spawned its own scholarship which does not need rehashing here.<sup>40</sup> In its essence, rightlessness refers to the state of unprotected legal status in which refugees often find themselves.<sup>41</sup> Rightlessness may be either *de facto* or *de jure*—what is decisive is a person's existence beyond the protection of the law.<sup>42</sup> Legal black holes refer to spaces of apparent rightlessness—classically, the use of Guantanamo Bay as a site of counterterrorism detention.<sup>43</sup> Of course, the metaphor of the legal black hole is also familiar to refugee lawyers, as extraterritorial migration control measures are seen to create—or expand—legal black holes, only to be extinguished—or at least contracted—by legal challenges.<sup>44</sup>

Most recently, Itamar Mann has called for the development of a discipline of legal black holes within international law more broadly, as an agenda to “identify legal black holes; locate areas in which law renders humans rightless.”<sup>45</sup> We share this methodological call to map and locate legal sites, if not necessarily the theoretical premise of (un)accountability. The topographical mapping we seek to advance is concerned with highlighting and bringing into focus the broad array of legal avenues that provide migrants and refugees with potential remedies. It challenges us to reconsider existing designations of legal black holes by emphasizing alternative and additional accountability opportunities yet to be explored or rarely pursued. As we explore below—although considered a classical legal black hole by some—the Manus Island RPC has, in fact, been a heavily contested legal site, with attempts to challenge its operation across several legal arenas.<sup>46</sup> This kind of explorative strategy, pursuing multiple legal avenues for accountability across several jurisdictions, is well-known in other fields, including business and human rights<sup>47</sup> and international criminal law.<sup>48</sup> With Agamben, we thus argue that rather than rightless spaces *per se*, the assembly of legal actions “divides them topologically like in a Leiden jar or Moebius strip” to blur boundaries and re-establish legal connections.<sup>49</sup>

<sup>39</sup>Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004).

<sup>40</sup>HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1973). For a list of relevant work, see Adel-Naim Reyhani, *Absolute Rightlessness Sur Place through Excessive Externalisation—The Case of Libya*, in EUR. YB. HUM. RTS. 2019 133, 135 n. 8 (Wolfgang Benedek et al. eds., 2019).

<sup>41</sup>Reyhani, *supra* note 40.

<sup>42</sup>Mann, *supra* note 20.

<sup>43</sup>R v. Foreign Secretary [2002] EWCA Civ 1598 para. 32; Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1994). On Guantanamo Bay as a site of legal excess, see Fleur Johns, *Guantanamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613 (2005).

<sup>44</sup>For example, see Ralph Wilde, *Legal Black Hole? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739 (2004); GAMMELTOFT-HANSEN, *supra* note 8; Violeta Moreno-Lax, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, 23 INT'L J. REFUGEE L. 174 (2011); Tom De Boer, *Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection*, 28 J. REFUGEE STUD. 118 (2014).

<sup>45</sup>Mann, *supra* note 20, at 370.

<sup>46</sup>Nikolas Feith Tan, *The Manus Island Regional Processing Centre: A Legal Taxonomy*, 20 EUR. J. MIGRATION & L. 427 (2018). Azadeh Dastyari & Maria O'Sullivan, *Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah*, 42 MONASH UNIV. L. REV. 308 (2016). See *infra* Section C.

<sup>47</sup>For example, the Shell Nigeria litigation has included claims under the United States Alien Tort Claims Act, Nigerian domestic law, and United Kingdom corporate law. For an overview of claims, see *Shell in Nigeria: The Case for New Legal Strategies for Corporate Accountability*, CORPORATE ACCOUNTABILITY LAB (July 5, 2018), <https://legaldesign.org/calblog/2018/7/5/shell-in-nigeria-the-case-for-new-legal-strategies-for-corporate-accountability>.

<sup>48</sup>A recent example is the Rohingya genocide claims, where accountability is being pursued simultaneously with the International Court of Justice, Argentinian domestic courts, and the International Criminal Court. For an overview, see Priya Pillai, *Three Complementary Legal Strategies for Accountability: A Momentous Week for the Rohingya*, OPINIO JURIS (Nov. 19, 2019), <http://opiniojuris.org/2019/11/19/three-complimentary-legal-strategies-for-accountability-a-momentous-week-for-the-rohingya/>.

<sup>49</sup>Giorgio Agamben, *We Refugees*, 49 SYMPOSIUM 114 (1995).

Third, and finally, the topographical approach draws on strands of literature on strategic litigation.<sup>50</sup> While the rise of strategic human rights or public interest litigation has attracted a fairly substantial body of scholarship,<sup>51</sup> strategic litigation on asylum and migration remains under-studied.<sup>52</sup> This is somewhat surprising given the robust practice of strategic litigation on refugee issues and the growing body of actors and networks dedicated to this issue.<sup>53</sup>

The perhaps best-known example of academic work in this area is Harold Koh's program of transnational public law litigation seeking to "vindicate public rights and values through judicial remedies."<sup>54</sup> Koh's thesis was put into practice in the *Sale* litigation on behalf of Haitian asylum seekers returned by U.S. authorities after the on-water screening.<sup>55</sup> One key commonality between transnational public litigation and the topographical approach pursued here is the focus on "strategic awareness of the transportability of those norms to other domestic and international fora for use in judicial interpretation or political bargaining."<sup>56</sup> While Koh's approach was limited to courts in the United States, our approach is explicitly concerned with mapping potential norm transfer and application to less explored regimes and jurisdictions. Given the inequality of resources available, transnational public law litigation has been critiqued for indirectly driving further externalization and outsourcing of migration control,<sup>57</sup> leading to violations of rights "along the fault lines between developing and developed countries."<sup>58</sup> Persistent—and seemingly massive—accountability gaps for violations in complex migration control settings appear to confirm this criticism. The topographical approach is thus an attempt to bridge these fault lines through a turn to less explored avenues of accountability in both Global North and Global South jurisdictions.

A final but important feature of the topographical approach is its invitation to explore multiple accountability avenues simultaneously. This is a point that may be met with resistance by some practitioners and scholars who argue that, in a world of finite resources, being strategic about litigation tends to come down to hard choices about the selection of cases, the choice of legal regime, and the forum in which to pursue them.<sup>59</sup> As we explore further in the following sections, however, there are several reasons why multipronged strategies may ultimately be more successful.

<sup>50</sup>For recent work defining strategic litigation, see Ramsden & Gledhill, *supra* note 17.

<sup>51</sup>Howard Tolley, *Interest Group Litigation to Enforce Human Rights*, 105 POL. SCI. Q. 617 (1990); CRAIG MARTIN SCOTT, *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* (2001); Catherine Corey Barber, *Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations*, 16 J. HUM. RTS. 411 (2011). HELEN DUFFY, *STRATEGIC HUMAN RIGHTS LITIGATION: UNDERSTANDING AND MAXIMISING IMPACT* (2018); ANDREW NOVAK, *TRANSNATIONAL HUMAN RIGHTS LITIGATION* (2019). With respect to practice, see, for example, *Global Human Rights Litigation Report*, OPEN SOCIETY JUSTICE INITIATIVE (Apr. 2018), <https://www.justiceinitiative.org/publications/global-human-rights-litigation-report>, though no asylum litigation is reported.

<sup>52</sup>BAUMGÄRTEL, *supra* note 11; Stephen Meili, *The Human Rights of Non-Citizens: Constitutionalized Treaty Law in Ecuador*, 31 GEO. IMMIGR. L.J. 347, 349 (2016); Frances Webber, *Asylum Seekers and Strategic Litigation*, in *ENTRAPPING ASYLUM SEEKERS: SOCIAL, LEGAL AND ECONOMIC PRECARIOUSNESS* 157 (Francesco Vecchio & Alison Gerard eds., 2017).

<sup>53</sup>See, for example, the work of ASYLUM ACCESS, <https://asylumaccess.org/global-advocacy/> (last visited Feb. 5, 2020); HEBREW IMMIGRANT AID SOCIETY (HIAS), <https://www.hias.org/tagged/litigation?page=1> (last visited Feb. 5, 2020); EUROPEAN CENTRE ON REFUGEES AND EXILES (ECRE), <https://www.ecre.org/our-work/strategic-litigation/> (last visited Feb. 5, 2020); ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE) CENTRE, <https://www.airecentre.org/litigation1> (last visited Feb. 5, 2020); EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR), <https://www.ecchr.eu/en/cluster/violence-rightlessness-at-europes-external-borders/> (last visited Feb. 5, 2020); NATIONAL JUSTICE PROJECT, <https://justice.org.au/what-we-do/#off-shore-refugees> (last visited Feb. 5, 2020); GLOBAL LEGAL ACTION NETWORK (GLAN), <https://www.glanlaw.org/migrationandborders> (last visited Feb. 5, 2020).

<sup>54</sup>Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

<sup>55</sup>Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation*, 18 MD. J. INT'L L. & TRADE 1 (1994); Harold Hongju Koh, *The Enduring Legacies of the Haitian Refugee Litigation*, 61 N.Y.L. SCH. L. REV. 31 (2016).

<sup>56</sup>Koh, *supra* note 54, at 2371.

<sup>57</sup>Gammeltoft-Hansen, *supra* note 4.

<sup>58</sup>Mann, *supra* note 12, at 316.

<sup>59</sup>See, *inter alia*, DUFFY, *supra* note 51, at 255–56.

First, practical experience shows that it is often difficult to foresee not only legal outcomes, but also the wider real-life impacts of what we subsequently recognize as landmark decisions.<sup>60</sup> Adam Weiss, Managing Director of the European Roma Rights Centre, likens strategic cases to black swans, in that they cannot be anticipated:

You cannot design one perfect case that will deliver dramatic results. What makes a case strategic can only be seen in retrospect: it has produced an unpredictable outcome. If the case's outcome could be predicted, it would not be strategic; everybody would see it coming. A strategic litigator's job is not to design the perfect case, but to create a *strategic litigative practice* out of which these game-changing cases are likely to emerge.<sup>61</sup>

In line with this, the topographical practice thus entails exploring a variety of cases, including “offbeat cases with open-ended positive potential.”<sup>62</sup> This does not mean that strategic thinking and resource questions remain unimportant. Certain fora may seem inherently more promising than others, just as migrants and their lawyers face very different, sometimes crippling, obstacles depending on the jurisdiction in which they attempt litigation. What it does mean is that our ability to correctly predict legal outcomes remains limited; past successes do not necessarily determine future outcomes, and strategic litigation projects may become subject to “lock-in effects” if training and experience are too narrowly focused.

Second, single-pronged strategies—focusing litigation on a particular court or body—are not only more vulnerable to general shifts in judicial practice, but an overload of cases may also in itself prompt reflexive effects in the form of political backlash or restrictive turns in interpretation.<sup>63</sup> As Wilde argues, *non-refoulement* and extraterritoriality cases are “at the heart” of current political debates around, for example, the European Convention on Human Rights and should prompt migration lawyers to carefully consider the wider risks of *prima facie* progressive judicial developments in terms of both the regimes in question and subsequent state responses further undermining migrant rights.<sup>64</sup> Distributing litigation efforts more evenly across different judicial bodies and legal regimes partly offsets these risks. Such distribution works by putting less pressure on individual legal institutions to take on a surrogate role in enforcing migrant rights,<sup>65</sup> and, crucially, by making it harder for states to anticipate and adjust their policies to new case law.<sup>66</sup>

Last, but not least, pursuing multiple claims simultaneously may, at least in some cases, help raise wider public awareness to the human rights issues in question. The recent decision by France to abandon the delivery of six coast guard boats to Libya is a case in point.<sup>67</sup> While the decision

<sup>60</sup>See *infra* Section D.

<sup>61</sup>Adam Weiss, *The Essence of Strategic Litigation*, in STRATEGIC LITIGATION: BEGRIFF UND PRAXIS 27, 28 (Alexander Graser & Christian Helmrich eds., 2019). In contrast, other authors generally assume a higher degree of predictive capability. As Mann argues, “we might try to foresee when pushing a court or another institution to uphold human rights will have, overall, results that are helpful to those we aim to help. This phase is characterized by cost-benefit reasoning and a cold, realistic view towards the incentives of actors in the real world.” Mann, *supra* note 12, at 388.

<sup>62</sup>Adam Weiss, *What is Strategic Litigation?*, EUROPEAN ROMA RIGHTS CENTRE (Jun. 1, 2015), <http://www.errc.org/news/what-is-strategic-litigation>.

<sup>63</sup>BAUMGÄRTEL, *supra* note 11; Ralph Wilde, *The Unintended Consequences of Expanding Migrant Rights Protections*, 111 AJIL UNBOUND 487 (2017). On the study of backlash to international courts more generally, see Karen J. Alter & Michael Zürn, *Backlash Politics: Introduction to a Symposium on Backlash Politics in Comparison* (iCourts Working Paper Series No. 174, 2019).

<sup>64</sup>Wilde, *supra* note 63, at 489.

<sup>65</sup>Thomas Gammeltoft-Hansen, *International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law*, 20 EUR. J. MIGRATION & L. 373 (2018). See DUFFY, *supra* note 51, at 255–56.

<sup>66</sup>Mann, *supra* note 12. See generally Thomas Gammeltoft-Hansen & Tanja E. Aalberts, *Transnational Law Revisited*, in TRANSNATIONALISATION AND LEGAL ACTORS: LEGITIMACY IN QUESTION (Bettina Lemann Kristiansen et al. eds., 2019).

<sup>67</sup>*La France renonce à livrer des navires aux garde-côtes libyens*, LE MONDE (Dec. 2, 2019), [https://www.lemonde.fr/international/article/2019/12/02/la-france-renonce-a-livrer-des-navires-aux-garde-cotes-libyens\\_6021295\\_3210.html](https://www.lemonde.fr/international/article/2019/12/02/la-france-renonce-a-livrer-des-navires-aux-garde-cotes-libyens_6021295_3210.html).



remains political, the matter was the subject of a lawsuit at the Paris Administrative Court of Appeal that—together with concurrent litigation against Italy before the European Court of Human Rights (ECtHR)—helped spark public attention and debate about the matter.<sup>68</sup> On a different but related issue, multiple claims filed concerning crimes against the Rohingya—with the International Criminal Court (ICC), the International Court of Justice, as well as the Federal Court of Buenos Aires—have considerably raised public attention to this issue.<sup>69</sup>

In sum, the topographical approach starts by perceiving the legal and geographical terrain where human rights violations or other legally wrongful acts related to migration control take place as a *site* for investigation. It seeks to represent the “surface features” of the law by surveying and mapping the various accountability structures in a holistic manner. And though it draws on critical thinking in regard to legal geography and strategic litigation, it retains a focus on the potentiality of law through structured and creative explorations of litigative opportunities.

### C. Towards Topographical Practice

Following the above, a topographical mapping of accountability may be conceived of as comprising at least two interrelated elements. First, the development of a wider transnational legal tool box, through attention to diverse legal regimes. These avenues include, but are not limited to, constitutional law, tort law, international criminal law, and the law of the sea. Second, applying a wider geographic lens to accountability. This involves paying more attention to the potential role of domestic courts and regional mechanisms in the jurisdictions pertaining to partner states for international cooperation on migration control. It may further involve considering accountability opportunities in and cooperation with the countries from which migrants and refugees originate or are returned to. This Section sets out steps toward topographical practice, with specific references to existing work and practice.

#### I. Mapping Accountability Across Regimes

From the perspective of international law, establishing accountability for migrant and refugee rights violations has always required a certain degree of adjudicatory exploration. The lack of a dedicated international court or quasi-judicial monitoring mechanism pertaining to the refugee regime has historically led scholars and practitioners to focus on domestic judiciaries. Over the past few decades, however, the rights of other categories of migrants have been contested before other legal institutions, invoking other human rights treaties,<sup>70</sup> as well as EU law.<sup>71</sup> While some of these institutions have remained more ambivalent about taking on a larger role in this issue area,<sup>72</sup> others have more generally embraced the opportunity to fill this judicial vacuum. Indeed, *non-refoulement* cases today make up the overwhelming majority of pending petitions before the Committee Against Torture.<sup>73</sup> New opportunities have further emerged as a result of normative and institutional developments. The CEDAW committee, for example,

<sup>68</sup>Amnesty International France et autres v. République Française, Le tribunal administratif de Paris, May 10, 2019, no. 1908601/9; SS and others v. Italy, App. No. 21660/18 (Nov. 11, 2019).

<sup>69</sup>Pillai, *supra* note 48.

<sup>70</sup>RUBIO-MARIN, *supra* note 8.

<sup>71</sup>COSTELLO, *supra* note 9.

<sup>72</sup>Vasiliki Kosta & Bruno de Witte, *Human Rights Norms in the Court of Justice of the European Union*, in HUMAN RIGHTS NORMS IN ‘OTHER’ INTERNATIONAL COURTS (Martin Scheinin ed., 2019); BAUMGÄRTEL, *supra* note 11.

<sup>73</sup>See Başak Çalı, Cathryn Costello & Stewart Cunningham, *Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies*, in this issue; Başak Çalı & Stewart Cunningham, *A Few Steps Forward, a Few Steps Sideways and a Few Steps Backwards: The CAT’s Revised and Updated GC on Non-Refoulement*, EJIL: TALK! (Mar. 20, 2018), <https://www.ejiltalk.org/part-1-a-few-steps-forward-a-few-steps-sideways-and-a-few-steps-backwards-the-cats-revised-anad-updated-gc-on-non-refoulement>.

has recognized an implied prohibition against *refoulement* and heard individual communications involving refugee authors.<sup>74</sup> The Committee on the Rights of the Child, which began receiving individual communications only in 2014, has started to receive complaints related to refugee children.<sup>75</sup>

Only recently, however, have scholars begun to substantively investigate accountability avenues beyond the human rights turn.<sup>76</sup> Recent research and litigation have emphasized the potential for challenging current migration control practices from the perspective of other legal frameworks, including international criminal law,<sup>77</sup> EU public procurement law,<sup>78</sup> constitutional law,<sup>79</sup> tort law,<sup>80</sup> and common law.<sup>81</sup> While earlier works on accountability often focus on core refugee rights—such as *non-refoulement*, access to asylum procedures, and freedom from arbitrary detention—common to this more recent generation of scholarship is an expanded focus on litigation for a broader set of rights and remedies. It is further noteworthy that several of these works emphasize a strategic reorientation back towards domestic legal frameworks, suggesting that in the current climate of backlash against international adjudication, national litigation strategies may prove more progressive and sustainable.<sup>82</sup> At the same time, it should be noted that domestic courts and their sphere of operation also face significant backlash in several Global North and Global South states; such a conclusion thus remains highly context specific. For the purpose of the present exercise, however, any such *a priori* choice of forum would be antithetical to a topographical approach. Hence, the following addresses a couple of lesser explored legal regimes, including both domestic and international law.

One source of accountability for both governments and multinational corporations involved in migration control, especially in common law jurisdictions, is tort law. In Australia, tort litigation in the context of the Nauru and Papua New Guinea RPCs has been effective in securing the transfer of hundreds of asylum seekers and refugees requiring medical treatment, ensuring financial compensation for inadequate detention conditions, and procuring access to safe and legal abortions.<sup>83</sup> Notably, in *Kamasae v. Commonwealth of Australia*, 1,900 asylum seekers and refugees detained at the Manus Island RPC settled a tort action for A\$70 million plus costs in a case alleging that the Australian government and its contractors, G4S and Transfield Services, were negligent in providing inadequate food, water, shelter, and security offshore.<sup>84</sup>

<sup>74</sup>U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 32: Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women CEDAW/C/GC/32 (2014). See further Çalı, Costello & Cunningham, *supra* note 73.

<sup>75</sup>CRC, N.B.F. v. Spain, U.N. Doc. CRC/C/79/D/11/2017 (Sep. 27, 2018).

<sup>76</sup>A parallel development is recent research examining the approach to human rights claims within the broader system of international courts and legal institutions. Scheinin, *supra* note 72.

<sup>77</sup>See Itamar Mann, *The Right to Perform Rescue at Sea: Jurisprudence and Drowning*, in this issue; Ioannis Kalpouzos & Itamar Mann, *Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece*, 16 MELB. J. INT'L L. 1 (2015). Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute: EU Migration Policies in the Central Mediterranean and Libya (2014–2019) (2019), <http://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> [hereinafter “Communication on Article 15 of the Rome Statute”].

<sup>78</sup>Thomas Spijkerboer & Elies Steyger, *Does the EU Violate Public Procurement Law in Its External Migration Policy?*, EU MIGR. L. BLOG (Nov. 28, 2019), <http://eumigrationlawblog.eu/does-the-eu-violate-public-procurement-law-in-its-external-migration-policy/>.

<sup>79</sup>Stephen Meili, *The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law*, 41 FORDHAM INT'L L.J. 382 (2017). Dastyari & O'Sullivan, *supra* note 46.

<sup>80</sup>Holly, *supra* note 19.

<sup>81</sup>Martin Jones, *Expanding the Frontiers of Refugee Law: Developing a Broader Law of Asylum in the Middle East and Europe*, 9 J. HUM. RTS. PRACT. 212 (2017).

<sup>82</sup>Meili, *supra* note 79. Gammeltoft-Hansen, *supra* note 65.

<sup>83</sup>See Gabrielle Holly, *Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation*, in this issue; Holly, *supra* note 19, at 74. *Plaintiff S99/2016 v. Minister for Immigration and Border Protection* [2016] FCA 483 ¶263 (Austl.).

<sup>84</sup>Majid Karami Kamasae, *Fourth Amended Statement of Claim*, Submission in *Kamasae v. Commonwealth*, [2017] SCI 2014 06770 (Austl.).

A recent article on the litigation concluded: “[T]ransnational human rights litigation, framed in tort, remains a powerful means of providing redress for (human rights) wrongs.”<sup>85</sup> Most known tort cases, however, while related to negligence and violations of the actor’s duty of care, seldom involve any explicit discussion of international human rights or refugee law. Yet, where the evidentiary threshold for a criminal conviction cannot be met, the lower standard of proof typically applied in civil actions may further establish responsibility. In the United States, both government and private contractor responsibility were considered in *Medina v. O’Neill and Danner’s Inc.* The case concerned sixteen stowaway migrants who were discovered by Immigration and Naturalization Service (INS) agents and subsequently detained by the private security company Danner’s Inc. in a windowless 12 by 20-foot cell owned by the company. Following unrest among those detained, a Danner’s Inc. employee, untrained in the use of firearms, used a shotgun as a prod and the gun went off, killing one migrant and wounding another. Criminal charges were never raised, and the INS rejected any responsibility for the actions of Danner’s Inc., which was contracted directly by the transportation company. In the ensuing civil suit, however, the district court found that, despite the absence of a direct contractual relationship, the “public powers” test was satisfied, and it held both the INS and Danner’s Inc. jointly and severally liable for damages.<sup>86</sup>

A further avenue for accountability is constitutional law and non-discrimination law.<sup>87</sup> Beyond the prominent example of the *Prague Airport* case—in which the UK House of Lords found that pre-departure checks of Roma persons at Prague airport breached national discrimination law—recent constitutional challenges, particularly in the Global South, have been at least partial successes. The Constitutional Court of Ecuador struck down a presidential decree that limited the rights of asylum seekers to apply for and appeal protection decisions and narrowed the meaning of “refugee” in national law.<sup>88</sup> In the context of offshore processing, the Papua New Guinea Supreme Court ordered the closure of the Manus Island RPC on constitutional grounds, ordering:

[B]oth the Australian and Papua New Guinea governments shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees Constitutional and human rights.<sup>89</sup>

Most recently, Guatemala’s Constitutional Court imposed a temporary injunction on the operation of a safe third country agreement with the United States.<sup>90</sup> Equally, litigation challenging

<sup>85</sup>Holly, *supra* note 19, at 80. Further research has focused on the requirements imposed by tort law in onshore immigration detention. Bernadette McSherry & Azadeh Dastyari, *Providing Mental Health Services and Psychiatric Care to Immigration Detainees: What Tort Law Requires*, 14 PSYCHIATRY, PSYCHOL. & L. 260 (2007).

<sup>86</sup>*Medina v. O’Neill*, 589 F. Supp. 1031 (S.D. Tex. 1984). The Court of Appeals subsequently found only negligence on behalf of the authorities given the lack of knowledge of the detention conditions by the INS. *Medina v. O’Neill*, 838 F.2d 800 (5th Cir. 1988). See also J.D. DONAHUE, PRISONS FOR PROFIT: PUBLIC JUSTICE, PRIVATE INTERESTS 18 (1988), <https://secure.epi.org/files/page/-/old/studies/prisons-1988.pdf>; Ira P. Robbins, *Privatization of Corrections: A Violation of US Domestic Law, International Human Rights, and Good Sense*, 13 HUM. RTS. BRIEF 12 (2006).

<sup>87</sup>David James Cantor, *The End of Refugee Law?*, 9 J. HUM. RTS. PRACT. 203 (2017); Maarten den Heijer, *Visas and Non-Discrimination*, 20 EUR. J. MIGRATION & L. 470 (2018).

<sup>88</sup>Sentencia N. 002-14-Sin-CC, Case No.: 0056-12-IN y 0003-12-IA, (Aug. 14, 2014) (Ecu.); Meili, *supra* note 52. On constitutional asylum in Europe, see Maria-Teresa Gil-Bazo, *Asylum as a General Principle of International Law*, 27 INT’L J. REFUG. L. 3 (2015).

<sup>89</sup>*Namah v. Pato*, para. 74(6) (Supreme Court of Papua New Guinea 2016).

<sup>90</sup>Sofia Menchu, *Guatemalan Court Halts ‘Safe Third Country’ Designation for Asylum Seekers*, REUTERS (July 15, 2019), <https://www.reuters.com/article/us-usa-immigration-guatemala/guatemalan-court-halts-safe-third-country-designation-for-asylum-seekers-idUSKCN1UAITK>.

the Canada-United States safe third country agreement under the Canadian Charter is ongoing.<sup>91</sup> As Stephen Meili points out, there is potential for constitutionalized human rights law to be transplanted to a range of national settings across regions.<sup>92</sup>

At the level of international law, recent communications to the ICC alleging crimes against humanity concerning both Australia's operations on Manus Island and the EU's role in pullback operations to Libya highlight issues of impunity, notwithstanding remote chances of success.<sup>93</sup> Other international bodies, however, may well come to play a role in these cases as well. One such entity is the International Tribunal for the Law of the Sea (ITLOS). As a body vested to adjudicate disputes under a legal regime governing both the competence of states to perform migration control at sea and situations involving search and rescue, ITLOS would be directly relevant to hear cases concerning both Europe's and Australia's maritime migration control.<sup>94</sup> In 2018, ITLOS's Vice President David Joseph Attard himself suggested that the tribunal may come to play a larger role in this area:

I believe that with the current migration at sea crisis, the Tribunal may be confronted with disputes which involve a thorough understanding of the relationship between the law of the sea and human rights law. In the light of its jurisprudence and its insistence on taking into account humanitarian considerations in maritime disputes, the Tribunal is best suited to deal with these issues.<sup>95</sup>

A similar integrationist approach has been emphasized in the tribunal's case law, noting that "states are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances."<sup>96</sup> The inter-state nature of the tribunal's jurisdiction would require cases be raised by flag states or competing coastal states—for example, in the context of disputes over disembarkation.<sup>97</sup> The tribunal similarly has jurisdiction in "prompt release cases" involving situations where a coastal state has detained a foreign flag vessel or its crew. Though proceedings are formally between states, private actors such as shipowners do, under certain circumstances, enjoy *de facto* standing to invoke their rights—something likely to be particularly important in cases involving non-governmental rescue vessels or merchant ships.<sup>98</sup>

## II. Wider Geographies of Accountability

Attention to legal topography also involves a geographical mapping of accountability. As migration control is enacted extraterritorially or in concert, involving cooperation between multiple

<sup>91</sup>Craig Damian Smith & Stephanie Hofmann, *Will Canada Suspend Its Safe Third Country Agreement With the United States?*, FOREIGN POLICY (Nov. 6, 2019), <https://foreignpolicy.com/2019/11/06/canada-suspend-safe-third-country-immigration-united-states/>; Efrat Arbel, *Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement Between Canada and the United States*, 25 INT'L J. REFUGEE L. 65 (2013).

<sup>92</sup>Meili, *supra* note 79.

<sup>93</sup>Global Legal Action Network (GLAN), *Communiqué to the Office of the Prosecutor of the International Criminal Court* (Feb 14, 2017), <https://www.cdn.law.stanford.edu/wp-content/uploads/2017/02/Communiqu%C3%A9-to-Office-Prosecutor-IntlCrimCt-Art15RomeStat-14Feb2017.pdf>; Communication on Article 15 of the Rome Statute.

<sup>94</sup>See Eftymios Papastavridis, *The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm*, in this issue.

<sup>95</sup>ITLOS Bench: Interview with Vice-President Attard (Malta), ITLOS NEWSLETTER 2018/3 (Aug. 2018), <https://www.itlos.org/en/press-media/itlos-newsletters/itlos-newsletter-20183/>.

<sup>96</sup>*Saint Vincent and the Grenadines v. Kingdom of Spain*, Judgment of May 28, 2018, ITLOS Reports 2013 [155]. See also Anna Petrig & Marta Bo, *The International Tribunal for the Law of the Sea and Human Rights*, in HUMAN RIGHTS NORMS IN 'OTHER' INTERNATIONAL COURTS (Martin Scheinin ed., 2019).

<sup>97</sup>Melanie Fink & Kristof Gombeer, *The Aquarius Incident: Navigating the Turbulent Waters of International Law*, EJIL: TALK! (Jun. 14 2018), [www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/](http://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/).

<sup>98</sup>Petrig & Bo, *supra* note 96.

states, private actors, and international organizations, the choice of forum through which to pursue accountability for human rights violations becomes particularly important.

In parallel to the limited trajectory regarding the regimes through which accountability has traditionally been sought, a geographical focus on the Global North may be argued to exist when it comes to the jurisdictions through which human rights violations are addressed.<sup>99</sup> For both scholars and strategic litigators, the principal question has remained how to hold sponsoring states accountable for their role in extraterritorial, outsourced, or privatized migration control. The concomitant responsibility of cooperating states in transit and origin countries as part of these schemes is seldom, if ever, considered. Consequently, the focus has remained on domestic, regional, and international mechanisms of accountability in the Global North.

For some, the persistence of a such a geographic focus in this particular context may be both understandable and justified. The current generation of cooperative deterrence has historically grown out of unilateral measures of externalization operated by asylum countries in North America, Europe, and Oceania. And even in their current form, cooperative schemes are premised upon global inequality, allowing wealthier states to contract, co-opt, or coerce their less affluent peers to provide access to their territory and engage their national authorities for migration control. Focusing on the legal liability of implementing states in the Global South is at best a distraction, and at worst may be argued to sustain exactly the responsibility shifting logic around which cooperative deterrence measures are designed.

At the same time, however, this narrow focus on accountability for and through legal institutions pertaining to sponsoring states may also be argued to reflect a more deepseated Western or Global North bias in refugee law scholarship more generally. As Cantor points out, relevant practice and case law from states in the Global South “rarely feed back into scholarship on global refugee law and tend instead to be treated in isolation, often as an exception to the ‘true’ international form of refugee law.”<sup>100</sup>

From a more practical perspective, the lack of attention to accountability opportunities within or pertaining to partner states in the Global South is problematic for several reasons. First of all, conceiving of accountability solely from the vantage point of extraterritorialization or outsourcing risks putting legal strategies at a conceptual disadvantage in light of current empirical developments. Although asylum countries in the Global North still lead policies of cooperative deterrence, the *locus* of control has shifted well beyond these regions. No longer is proximity to the destination border all that important. Practice has turned to upstreaming, which involves strategic interventions at early junctures on the migration route.<sup>101</sup> Second, current cooperation on migration management often leaves the actual implementation of controls largely to the authorities of partner states. As Giuffré and Moreno-Lax argue, they are designed to render the actions of destination states “contactless,”<sup>102</sup> avoiding physical contact with people on the move, and thus any jurisdictional link.<sup>103</sup>

The political agency of Global South states engaging in cooperative migration control should not be ignored. Such agency may be both positive or negative. For example, Gerasimos Tsourapas’s work accounts for how “refugee rentier” states such as Jordan, Lebanon, and Turkey have used the Syrian refugee crisis to their advantage.<sup>104</sup> In other cases, however, host

<sup>99</sup>Gammeltoft-Hansen, *supra* note 65.

<sup>100</sup>Cantor, *supra* note 87. See also Jones, *supra* note 81.

<sup>101</sup>Thomas Gammeltoft-Hansen & Nikolas Feith Tan, *Extraterritorial Migration Control and Deterrence*, in THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW (Cathryn Costello, et al. eds., forthcoming).

<sup>102</sup>Moreno-Lax & Giuffré, *supra* note 4; Gammeltoft-Hansen, *supra* note 65, at 379–80.

<sup>103</sup>See Violeta Moreno-Lax, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the “Operational Model”*, in this issue.

<sup>104</sup>Gerasimos Tsourapas, *The Syrian Refugee Crisis and Foreign Policy Decision-Making in Jordan, Lebanon, and Turkey*, 4 J. GLOB. SECURITY STUD. 464 (2019). On Fidel Casto’s creation of an exodus crisis, see Kelly M. Greenhill, *Engineered Migration as a Coercive Instrument: The 1994 Cuban Balseros Crisis* (Rosemary Rogers Working Paper Series, 2002). On potential avenues

states in the Global South—or political factions within them—have shown general resistance to the kind of sovereign impositions that cooperation on migration control entails.<sup>105</sup> A greater focus on the potential risks—be it in legal, domestic, political, or reputational terms—of cooperation with Northern-led migration control policies may help to shift the balance of national policies towards respect for migrant rights.

Finally, such a bias further ignores the growing body of case law, research, and mobilization in regard to refugee rights and migration control from the Global South.<sup>106</sup> Recent research thus documents how European externalization policies are increasingly contested by NGOs, academics, and state actors from within the countries in which they operate.<sup>107</sup> As early as 2008, Barbara Harrell-Bond called for the construction of a refugee rights infrastructure in the Global South, including legal aid for asylum seekers and refugees.<sup>108</sup> More recently, the Law of Asylum project—operating in Egypt, India, Malaysia, and Hong Kong—could be seen as an example of what we would call topographical practice, using relevant local legal frameworks to protect refugees.<sup>109</sup>

The role of domestic courts in the countries where cooperative migration control operates should further not be underestimated. As detailed in the subsequent Section, it was neither UN treaty bodies nor domestic courts in Australia that finally undid Australia's offshore processing center on Manus Island, but rather the Papua New Guinea Supreme Court.<sup>110</sup> In 2017, a Libyan appeal court suspended the Memorandum of Understanding signed between Libya and Italy, though the Supreme Court subsequently overturned the decision.<sup>111</sup> In January 2019, a Mexican Administrative Court held that a thirty-day application deadline for protection procedures breached the right to asylum in the Mexican Constitution.<sup>112</sup>

A broader geographical approach to accountability for migration control, also including partner countries in the Global South, further provides access to a different set of regional mechanisms. To cite just one example, the African Commission on Human and Peoples' Rights has recently been identified as an arena for increased interventions, with a mandate to protect and promote human rights drawn from the 1981 African Charter on Human and Peoples' Rights.<sup>113</sup> The Charter has been

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for the international community to prevent deliberate displacement, see Phil Orchard, *Making States Accountable for Deliberate Forced Displacement* (World Refugee Council Research Paper No. 17, Jun. 2019).

<sup>105</sup>See *infra* Section D.

<sup>106</sup>REGIONAL APPROACHES TO THE PROTECTION OF ASYLUM SEEKERS: AN INTERNATIONAL LEGAL PERSPECTIVE (Ademola Abass & Francesca Ippolito eds., 2016); MARINA SHARPE, THE REGIONAL LAW OF REFUGEE PROTECTION IN AFRICA 220 (2018).

<sup>107</sup>Thomas Faist, *Contested Externalisation: Responses to Global Inequalities*, 7 COMP. MIGRATION STUD. (2019). See also Inka Stock, Aysen Üstübcü & Susanne U. Schultz, *Externalization at Work: Responses to Migration Policies from the Global South* 7 COMP. MIGRATION STUD. (2019). Kate Ogg, *Protection from Refuge: The Role of Courts along the Refugee Journey* (Ph.D. Thesis, Australian National University, 2019).

<sup>108</sup>Barbara Harrell-Bond, *Building the Infrastructure for the Observance of Refugee Rights in the Global South*, 25 REFUGE: CAN. J. ON REFUGEES 12, 19 (2008).

<sup>109</sup>Jones, *supra* note 81. See *The Law of Asylum in the Middle East and Asia*, LAW OF ASYLUM, <https://www.lawofasylum.net/projects> (last visited Feb. 5, 2020). See, for example, Kelly Loper, *Prospects for Refugee Rights in Hong Kong: Towards the Legalization and Expansion of Protection from Refoulement*, in PROTECTION OF REFUGEES AND DISPLACED PERSONS IN THE ASIA PACIFIC REGION (Angus Francis & Rowena Maguire eds., 2013).

<sup>110</sup>Namah v. Pato (2016). See also Dastyari & O'Sullivan, *supra* note 46.

<sup>111</sup>*Tripoli Court Blocks Serraj's Migrant Deal with Italy: Effect Unclear*, LIBYA HERALD (Mar. 22, 2017), <https://www.libyaherald.com/2017/03/22/tripoli-court-blocks-serrajs-migrant-deal-with-italy-effect-unclear/>; *Supreme Court Overturns Lower Court Ban on Libya-Italy Migrant Deal as Italian Interior Minister Discusses Issue with Fezzan Mayors*, LIBYA HERALD (Aug. 26, 2017), <https://www.libyaherald.com/2017/08/26/supreme-court-overturns-lower-court-ban-on-libya-italy-migrant-deal-as-italian-interior-minister-discusses-issue-with-fezzan-mayors/>.

<sup>112</sup>Juicio de Amparo Indirecto 115/2018 (Jan. 15, 2019) (Jonathan Bass Herrera, Juez Segundo de Distrito del Centro Auxiliar de la Primera Región en Materia Administrativo). See also Stephen Meili, *Constitutionalized Human Rights Law in Mexico: Hope for Central American Refugees*, 32 HARV. HUM. RTS. J. 103 (2019).

<sup>113</sup>Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter) art. 12(3), June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter "African Charter on Human and Peoples' Rights" or "Africa Charter"]. The African Charter has been ratified by 53 of the 54 member states of the African Union, including Morocco and Libya.

interpreted as extending the Commission's mandate to the interpretation of the Refugee Convention and 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa (OAU Convention), an instrument otherwise lacking a supervisory treaty body.<sup>114</sup> Moreover, the Commission has been innovative in terms of standing, allowing petitions from both individuals and NGOs who are not victims of the violation, provided a victim is identified.<sup>115</sup> The Commission has been characterized as a “complementary” source of refugee protection and heard a number of cases from asylum seekers and refugees, relating to reception conditions, *non-refoulement*, and return.<sup>116</sup> The legal weight of the Commission's views is generally thought to be nonbinding, with the Charter referring only to an ability to make recommendations to state governments.<sup>117</sup>

Given Maria Sharpe concludes the Commission is a “viable forum for the enforcement of refugee rights,” it is perhaps surprising that no petitions have thus far been brought to the African Commission concerning cooperative migration control policies between African and European states. In principle, accountability could be pursued through parallel applications to the ECtHR with respect to the conduct of the European state, and to the African Commission with respect to the conduct of the African state. Recently, for example, Italian and Egyptian NGOs jointly called for African Commission investigations into human rights abuses in Libya.<sup>118</sup>

Last, but not least, applying a topographical approach opens up a range of possibilities through which to hold sponsoring states accountable through claims made from, or through, countries in the Global South. The political and economic inequality underpinning most cooperative deterrence schemes may well give rise to challenges from political actors in partner states. It is notable that the Papua New Guinea case was brought not on behalf of detained asylum seekers, but by a political opposition leader on the basis that detention of asylum seekers within the center violated the right to personal liberty enshrined in the country's constitution.<sup>119</sup>

Similar dynamics can be observed in other areas of international law. Gambia recently filed an application instituting procedures and requesting provisional measures at the International Court of Justice in regard to the Rohingya genocide claim.<sup>120</sup> Days later, a lawsuit concerning the same issue was filed in Argentina, a country whose domestic courts have previously applied the principle of universal jurisdiction in cases involving international crimes.<sup>121</sup> Both cases highlight the potential of other jurisdictional bases—including nationality jurisdiction and flag state jurisdiction of, for example, rescue vessels—as ways to open up domestic and inter-state litigation in regard to refugees and migration. Besides the clear overlap with innovations in international criminal law explored above, these examples demonstrate how different jurisdictions can be leveraged to bring litigation.

As mentioned in the previous Section, tort law may further provide an important mechanism through which to secure accountability for human rights violations by foreign actors, both private and public. Most well-known in this regard is the United States' Aliens Tort Claims Act (ATCA), which allows foreigners, including migrants and refugees, to bring claims against non-state actors

<sup>114</sup>Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Sep 10, 1969, 1001 U.N.T.S. 45; African Charter on Human and Peoples' Rights arts. 60–61; SHARPE, *supra* note 106, at 203.

<sup>115</sup>Gina Bekker, *The Protection of Asylum Seekers and Refugees Within the African Regional Human Rights System*, 13 AFR. HUM. RTS. L.J. 1 (2013).

<sup>116</sup>Monette Zard, Chaloka Beyani & Chidi A. Odinkalu, *Refugees and the African Commission on Human and Peoples' Rights*, 16 FORCED MIGRATION REV. 33 (2003).

<sup>117</sup>SHARPE, *supra* note 106, at 218.

<sup>118</sup>The Cairo Institute for Human Rights Studies, Associazione Ricreativa Culturale Italiana (ARCI) & Association for Juridical Studies on Immigration (ASGI), *NGO Coalition Requests African Commission on Human Rights to Probe Atrocities Against Migrants in Libya* (July 22, 2019), <https://www.asgi.it/wp-content/uploads/2019/07/Press-Realease-23.07.19.pdf>.

<sup>119</sup>Similarly, the 2017 claim to suspend the Memorandum of Understanding signed between Libya and Italy was brought by former Justice Minister Salah Al-Marghani and was closely linked to the domestic political disputes in Libya.

<sup>120</sup>Application Instituting Proceedings and Request for Provisional Measures (*Gambia v. Myanmar*), 2019 I.C.J. 47 (Nov. 11).

<sup>121</sup>Pillai, *supra* note 48.

for human rights violations.<sup>122</sup> Claims have equally been accepted in instances where individuals or corporations have acted on behalf of a government, as have suits against both private parties and the US government.<sup>123</sup> The 2013 US Supreme Court ruling in *Kiobel* laid down a general presumption against extraterritorial application that brought an end to several pending claims.<sup>124</sup> The Supreme Court, however, also noted that this presumption may be rebutted where claims can be shown “with sufficient force” to “touch and concern the territory of the United States.”<sup>125</sup> Other jurisdictions, especially within common law countries, may come to fill this gap without facing similar restrictions. We could well see a more active role for transnational tort litigation both within the countries where violations in the context of migration control take place as well as the victims’ countries of origin.<sup>126</sup> Relatedly, complaints against corporations involved in migration control under the UN Guiding Principles on Business and Human Rights may also play a role.<sup>127</sup>

In sum, the choice of forum should not be limited to accountability mechanisms in or pertaining to the role of states in the Global North. An exclusive focus on the responsibility of sponsoring states risks coming at the expense of migrants and refugees, for whom the international justice element is likely to be a secondary concern to the human rights violations endured. In cases concerning cooperative deterrence, each state should be held accountable to the extent of their legal responsibility. A broader focus on accountability in the Global South does not mean that political power asymmetries are ignored. On the contrary, the topographical mapping offers a set of complementary pathways through which to address the responsibility of sponsoring states.

#### D. A Topographical Retrospective: The Manus Island Regional Processing Centre

The myriad attempts to establish accountability for human rights breaches at the Manus Island RPC is perhaps the best extant example of a topographical approach in practice. In November 2012, the transfer of asylum seekers intercepted by Australian authorities to Papua New Guinea began in a reboot of the Pacific Solution in place between 2001 and 2008. Under a hastily concluded bilateral agreement providing for the processing of asylum claims and the settlement of refugees in Papua New Guinea,<sup>128</sup> asylum seekers were held in closed detention in a remote navy base on Los Negros Island, immediately adjacent to Manus Island.

At the time, Papua New Guinea lacked a national asylum framework, with no regulations transposing Article 1A(2) of the 1951 Convention into national law and no regulations governing the asylum procedure. Final status determinations were not forthcoming until the middle of 2015, almost two and a half years after the arrival of the first cohort of asylum seekers.<sup>129</sup>

<sup>122</sup>See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Alien Tort Claims Act (or Alien Tort Statute), 28 U.S.C. § 1350 (2018).

<sup>123</sup>*Sosa v. Alvarez-Machain*, 540 U.S. 1160 (2004).

<sup>124</sup>*Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108 (2013).

<sup>125</sup>*Id.*

<sup>126</sup>See Holly, *supra* note 83; GAMMELTOFT-HANSEN, *supra* note 37; Donald Childress, *Kiobel Commentary: An ATS Answer with Many Questions (and the Possibility of a Brave New World of Transnational Litigation)*, SCOTUS BLOG (Apr. 18, 2013), <https://www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation/>.

<sup>127</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*, Seventeenth Session, Agenda Item 3, U.N. Doc. A/HRC/17/31, annex (Mar. 21, 2011).

<sup>128</sup>Regional resettlement arrangement between Australia and Papua New Guinea, Austl.-Papua N.G., July 19, 2013; 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, Austl.-Papua N.G., Aug. 6, 2013.

<sup>129</sup>Elibritt Karlsen, *Australia’s Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to the Statistics*, PARLIAMENT OF AUSTRALIA 9 (Dec. 19, 2016), [https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4129606/upload\\_binary/4129606.pdf;fileType=application/pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4129606/upload_binary/4129606.pdf;fileType=application/pdf).



The RPC held 1,300 asylum seekers and refugees at the height of its operations. From July 2013, due to the harsh conditions, only men were transferred to the Centre. Existing literature accounts for the clear breaches of human rights and refugee law that occurred at the Manus Island RPC.<sup>130</sup> Following the decision of the Papua New Guinea Supreme Court in *Namah v. Pato*, the RPC was formally closed on October 31, 2017. While the Centre is no longer in operation, around 200 asylum seekers and refugees remain in Papua New Guinea in need of solutions.

From the outset, the Manus Island RPC was constantly the object of legal challenges in national and international fora.<sup>131</sup> Applied to the approach advanced above, the Manus Island RPC was the site of criss-crossing legal regimes, with litigation spanning international human rights law, international criminal law, business and human rights, and, at the national level, constitutional law and the common law tort of negligence.<sup>132</sup>

The following selected chronological examples illustrate the multiple legal strategies attempted with respect to the Centre. In June 2014, the High Court of Australia dismissed an application of an asylum seeker who had been transferred to the Manus Island RPC and unsuccessfully claimed the transfer went beyond the alien's power contained in Section 51(xix) of the Australian Constitution.<sup>133</sup> In September 2014, an unsuccessful complaint was submitted to the United Kingdom National Contact Point under the Organisation for Economic Co-operation and Development (OECD) against G4S for its role in the operation of the RPC.<sup>134</sup> In December 2014, the Committee Against Torture in Geneva, in its concluding observations on Australia, found the RPC triggered Australia's obligations extraterritorially.<sup>135</sup>

In April 2016, the Supreme Court of Papua New Guinea in *Namah v. Pato* held that detention of asylum seekers under the bilateral arrangement breached the right to liberty set out in the constitution, precipitating the eventual closure of the RPC in October 2017.<sup>136</sup> In July 2016, Australian courts began acknowledging a duty of care founded in tort to transfer asylum seekers and refugees from the RPCs on Manus Island and Nauru to Australia.<sup>137</sup> In February 2017, Stanford Law School and the Global Legal Action Network (GLAN) requested that the ICC prosecutor investigate possible crimes against humanity at the RPCs.<sup>138</sup> In June 2017, a settlement was reached in a class action suit brought by 1,900 detainees against the Australian government and its contractors at the Manus Island site for A\$70 million, plus costs (Figure 1).<sup>139</sup>

<sup>130</sup>Dastyari & O'Sullivan, *supra* note 46; Madeline Gleeson, *Protection Deficit: The Failure of Australia's Offshore Processing Arrangements to Guarantee 'Protection Elsewhere' in the Pacific*, INT'L J. REFUGEE L. (Oct. 16, 2019), <https://academic.oup.com/ijrl/advance-article/doi/10.1093/ijrl/eez030/5588665>.

<sup>131</sup>For a full account, see Tan, *supra* note 46.

<sup>132</sup>Holly, *supra* note 19.

<sup>133</sup>*Plaintiff S156/2013 v. The Minister for Immigration and Border Protection & Anor* [2014] HCA 22 (Austl.).

<sup>134</sup>Human Rights Law Centre (HRLC) and Rights and Accountability in International Development (RAID), Complaint Concerning G4S Australia Pty. Ltd. (Sep. 23, 2014), [static1.squarespace.com/static/580025f66b8f5b2dabbe4291/58169937bb7f1e05acdfbeea/58169a12bb7f1e05acdfd043/1477876242459/HRLC\\_RAID\\_Complaints\\_OECD\\_Guidelines\\_specific\\_instance\\_G4S\\_Sep2014.pdf?format=original](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/58169937bb7f1e05acdfbeea/58169a12bb7f1e05acdfd043/1477876242459/HRLC_RAID_Complaints_OECD_Guidelines_specific_instance_G4S_Sep2014.pdf?format=original).

<sup>135</sup>Committee against Torture, Concluding Observations on the Fourth and Fifth Periodic Reports of Australia, U.N. Doc. CAT/C/AUS/CO/4-5 (Nov. 26, 2014); Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, U.N. Doc. CCPR/C/AUS/CO/6 (Nov. 9, 2017).

<sup>136</sup>*Namah v. Pato* (2016).

<sup>137</sup>See *Plaintiff S99/2016 v. Minister for Immigration and Border Protection* [2016] 243 FCR 17 (Austl.). See also *FRX17* as litigation representative for *FRM17 v. Minister for Immigration and Border Protection* [2018] FCA 63 (Austl.); *AYX18 v. Minister for Home Affairs* [2018] FCA 283 (Austl.).

<sup>138</sup>Global Legal Action Network (GLAN), *Communique to the Office of the Prosecutor of the International Criminal Court*, (Feb. 14, 2017), <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/02/Communique%20to-Office-Prosecutor-IntlCrimCt-Art15RomeStat-14Feb2017.pdf>. In February 2020, the Office of the Prosecutor at the ICC responded, finding the operation of the Manus Island RPC did not constitute crimes against humanity. See Ioannis Kalpouzos, *International Criminal Law and the Violence against Migrants*, in this issue.

<sup>139</sup>Majid Karami Kamasae, Fourth Amended Statement of Claim, Submission in *Kamasae v. Commonwealth*, [2017] SCI 2014 06770 (Austl.); Holly, *supra* note 19.

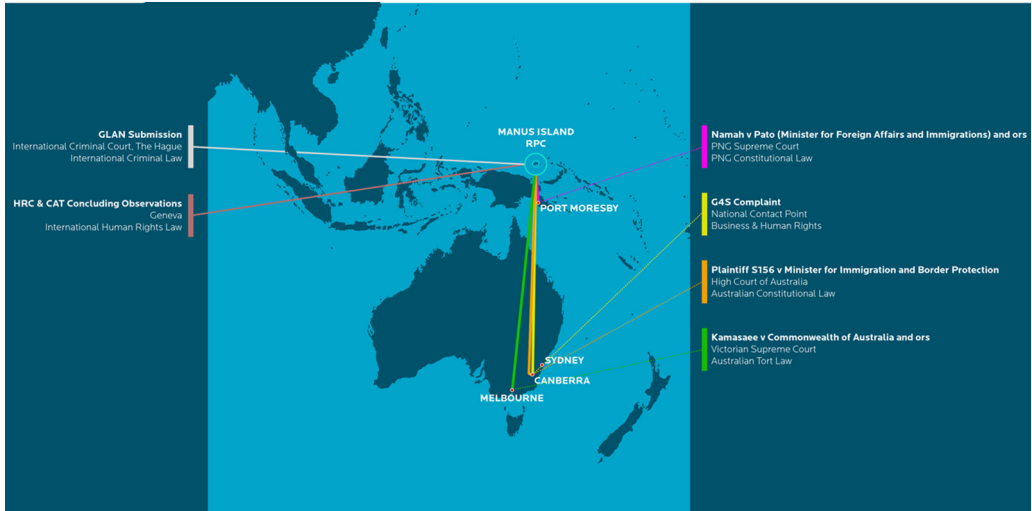


Figure 1. Accountability avenues in regard to the Manus Island Regional Processing Centre

This brief account of legal interventions with respect to the Manus Island RPC points to the potential of a topographical approach. A number of different legal regimes were invoked, including domestic law in the Global South.<sup>140</sup> In Australia, common law tort litigation has become the most important vehicle for remedies and protection against violations of human rights in the offshore RPCs in the absence of a bill of rights and relatively weak judicial review.<sup>141</sup> These efforts are rarely coordinated. For example, while Australian NGOs were active in pursuing legal challenges to the Manus Island RPC, litigation in Papua New Guinea was, as mentioned, brought by a former leader of the opposition.

The Manus Island case equally demonstrates varying levels of accountability. In the absence of enforceable international standards and a binding regional mechanism in Asia-Pacific, domestic jurisdictions came to the forefront. While *Namah v. Pato* effectively outlawed the policy of arbitrary detention in Papua New Guinea, requiring the RPC's eventual closure, Australian litigation for medical transfer is highly individualized, turning on the specific medical condition and availability of treatment in Nauru, Papua New Guinea, or a third country.<sup>142</sup> At the global level, complaints to the ICC elevate pressure on participating governments, notwithstanding slim chances of a trial, while the UN treaty bodies and special rapporteurs also raise awareness, maintain scrutiny, and elicit responses from the Australian government.<sup>143</sup>

Given the increase of migration control arrangements between countries in the Global North and South, the emergence of sites akin to the Manus Island RPC is more than a distant possibility. While we by no means claim that the legal interventions set out above were entirely successful in preventing or protecting from human rights breaches, they clearly were crucial in mitigating impunity, rightlessness, and unfettered state actions and thus provide important lessons for future efforts.

<sup>140</sup>Cantor, *supra* note 87.

<sup>141</sup>For example, see Marinella Marmo & Maria Giannacopoulos, *Cycles of Judicial and Executive Power in Irregular Migration*, 5 COMP. MIGRATION STUD. 16 (2017).

<sup>142</sup>Gleeson, *supra* note 130; Holly, *supra* note 83.

<sup>143</sup>Committee against Torture, Concluding Observations on the Fourth and Fifth Periodic Reports of Australia, U.N. Doc. CAT/C/AUS/CO/4-5 (Nov. 26, 2014); Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, U.N. Doc. CCPR/C/AUS/CO/6 (Nov. 9, 2017).

What lessons can be drawn from the Manus Island case? While definitive conclusions are difficult to draw, three observations may inform future accountability efforts in this and other regions. First, litigation in the national courts of both states played a key role in challenging this migration control site. In Australia, tort law has emerged as the most effective strategy to achieve the transfer of asylum seekers and refugees off the islands, while in Papua New Guinea constitutional law ended the RPC's operation. Second, legal challenges could potentially have been expedited and streamlined through coordination. While there was a level of coordinated advocacy, primarily in Australia, the *ad hoc* and disparate nature of legal complaints points to a lack of an overarching strategic approach. Finally, there was no unitary case or even legal regime that provided remedies to refugees at the Manus Island RPC; rather, accountability efforts relating to the site were varied and fragmented.

## E. Conclusions

This Article has attempted to advance a systematic approach to mapping accountability avenues for human rights violations in the context of migration control. Drawing on legal geography, we have argued that accountability structures may usefully be approached topographically, as a practice of systematically surveying the surface features and creatively (re)constructing the transnational legal architecture surrounding sites of human rights violations.

Thus, rather than advocating for accountability in regard to particular regimes or jurisdictions, the topographical approach offers a general framework for mapping and exploring the full grid of potential accountability mechanisms. We readily acknowledge the breadth and difficulty of such an exercise, and the present article has but scratched the surface through the examples provided. Nonetheless, as a methodological tool, we believe the topographical approach adds value by stressing an inherently open-ended and explorative agenda for achieving accountability that can help identify blind spots or critically reassess existing trajectories. The elements of topographical practice outlined in the present Article are only a starting point. The mapping of regimes and jurisdictional avenues ultimately serve to enable wider reflections around the relative value and possibilities provided by different, and often corollary, approaches to accountability.

Such an analysis invariably presents further questions and dilemmas not touched upon here. The avenues outlined above entail very different legal, jurisdictional, political, and strategic implications. What strategy or litigative avenues are most likely to prove successful and effective in constraining state action will necessarily vary from situation to situation.<sup>144</sup> The crucial intervention in the Manus Island case came from the national court of the partner state, likely reflecting the relatively weak enforcement of international human rights law in both Australia and the Asia-Pacific more broadly. In contrast, a mapping of the legal topography in regard to current cooperation on migration control with, for example, Libya would paint a different picture. Despite the backlash, the European regional human rights regime remains powerful compared to other similar regimes, and litigative opportunities in Libya conversely limited.

Nor should legal accountability discussions be blind to the wider economic and political context in which they are couched. At present, resources to pursue accountability mechanisms, particularly in the Global South, remain severely limited. With respect to both scholarship and litigation, new transnational alliances are necessary to tackle the cooperative migration control measures across North and South. Topographical practice thus requires transnational expertise likely only to arise through cooperation.

At a deeper level, the topographical approach finally raises questions about the future development and coherence of international migration and refugee law. The topographical approach is based on what might be called pragmatic disaggregation by stressing multipronged approaches to

<sup>144</sup>DUFFY, *supra* note 51, at 273.

accountability.<sup>145</sup> Still, asking multiple judiciaries across regimes to rule on the same issues is also more likely to lead to contradictory and conflicting results. While a single win may, ideally, be enough to prompt even far-ranging changes in state practice, there is equally a risk that judicial fragmentation undermines doctrinal efforts to espouse universal claims or interpretations of migrant rights. This is a risk that must be tolerated if, as we believe, multi-pronged approaches remain the best bet through which to ensure accountability for human rights violations in the context of migration control. Navigating such a fragmented judicial landscape, moreover, is hardly a new challenge for migration and refugee lawyers. For decades, accountability in this area of law has relied on networks of national courts, in which individual decisions are never “final stops” but at best “way stations” in the “complex enforcement” of migrant refugee rights.<sup>146</sup>

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<sup>145</sup>We adopt this term in contradistinction to Itamar Mann’s notion of “radical disaggregation.” Mann, *supra* note 12, at 384. In contrast to Mann’s description—citing Keohane—we assume that transnational decision-making structures are not anarchic, but rather multipolar, partly overlapping and partly connected. While this indeed makes universal normative claims harder, though not impossible, to make, it does not entail a collapse of international legal authority as Mann suggests. *Id.* at 387. See generally Gammeltoft-Hansen & Aalberts, *supra* note 66.

<sup>146</sup>Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 *YALE L.J.* 2391, 2406 (1994).