

## Sovereignty, Protection and the Limits to Regional Refugee Status Determination Arrangements

*Plaintiff M70/2011 v Minister of Immigration and Citizenship* [2011] HCA 32; *Plaintiff M106 of 2011 by his litigation Guardian, Plaintiff M70/2011 v Minister of Immigration and Citizenship* [2011] HCA 32

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### Keywords

Refugee Law, Safe Third Country, Regional Processing, Sovereignty, Australian High Court, Malaysia Solution, Hierarchy of Mobility

### Abstract

This case note explores the recent Australian High Court decision of *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, which declared a proposed regional refugee status determination arrangement between Australia and Malaysia to be unlawful under Australian law. While the decision was determined by the specific statutory construction of Australian's migration legislation, it nonetheless draws attention to the legal character of what constitutes 'protection' under international refugee law and suggests the necessary legal and factual conditions that must exist in a 'third country' in order for any transfer of refugee processing and recognition procedures to be seen to satisfy Convention obligations. It thus represents a significant judicial challenge to the contemporary trend pursued by wealthy industrialised nations in the Global North towards erecting barriers for accessing domestic asylum regimes and adopting policies that in effect outsource and extraterritorialise asylum processing under the guise of 'burden sharing' or regional 'harmonisation'. This case note reads the decision as a particular re-articulation of sovereign authority, borders, belonging and place-making.

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## I. Introduction

On 31 August 2011, the Australian High Court held that a Ministerial declaration implementing a bilateral regional refugee status determination arrangement between Australia and Malaysia was unlawful under Australian law. In *Plaintiff M70/2011 v Minister for Immigration and Citizenship*,<sup>1</sup> the Court explored the limits under domestic law of the particular incorporation of the ‘safe third country’ concept. This concept could have seen the transferral of responsibility to Malaysia for the processing and recognition of a particular category of asylum seeker claims. While the protection against *refoulement* (articulated in Article 33 of the Refugee Convention<sup>2</sup>) has long been recognised as the ‘fundamental’ or ‘cornerstone’ principle of international refugee law, the principle also forms the basis for the development of State practices promoting the concept of a ‘safe third country’.<sup>3</sup> The current case is significant in demonstrating domestic courts’ increased willingness to partially introduce broader Refugee Convention obligations beyond that of *non-refoulement* into domestic law when determining what constitutes ‘access’ to effective procedures and ‘protection’ in the context of regional processing arrangements.

This case also represents a significant judicial challenge to the contemporary trend pursued by wealthy industrialised nations in the Global North towards erecting further barriers to accessing domestic asylum regimes and adopting policies that in effect outsource and extra-territorialise asylum processing under the guise of ‘burden sharing’ or regional ‘harmonisation’.<sup>4</sup> While the decision was determined by the specific statutory construction of the Australian legislative provision, it nonetheless draws attention to the legal character of ‘protection’ and suggests the necessary factual and legal preconditions that must exist in a ‘third country’ in order for any transfer of refugee processing and recognition procedures to satisfy Refugee Convention obligations.

## II. Background and Facts

The plaintiffs were two Afghani citizens, one a minor, who arrived in Australia on 4 August 2011 intending to seek asylum. The plaintiffs travelled by boat from Indonesia to the Australian territory of Christmas Island without valid Australian entry visas. Christmas Island is located approximately 2,600km northwest of Perth (the nearest capital city on the Australian mainland) and 320km south of Java, Indonesia, and forms part of the extensive network of islands to the north of the Australian mainland that was excised from Australia’s migration zone in the wake of the now-infamous Tampa crisis.<sup>5</sup> Thus, the plaintiffs were classified as ‘offshore entry persons’ for the purposes of Australia’s Migration Act<sup>6</sup> (‘the Act’) and subject to a different legal regime than those seeking asylum on mainland Australia. As ‘offshore entry person[s]’, the plaintiffs were not entitled to a right to make an asylum application, but rather could be granted a protection visa at the discretion of the Australian Minister of Immigration and Citizenship (‘the Minister’). The Act also allowed for an ‘offshore entry person’ to be taken to another country for processing if it had been declared a ‘specified country’ under the Act by the Minister. This in effect incorporated a particular articulation of the ‘safe third country’ concept as developed through State practice in States’ implementation of international refugee law.<sup>7</sup> Under section 198A(3) of the Act, the Minister may declare that a ‘specified country’:

- (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
- (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
- (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

1 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; *Plaintiff M106 of 2011 by his litigation Guardian, Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (Plaintiff M70/2011).

2 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention or Convention).

3 A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009) 49. The United Nations High Commissioner for Refugees (UNHCR) defined the State practice of transferring asylum-seekers to a ‘safe third country’ under the idea of ‘protection elsewhere’ as a mechanism that in effect ‘den[ies] an asylum seeker admission to substantive asylum procedures in a particular State on the ground that he/she could request or should have requested and, if qualified, would actually be granted, asylum and protection in another country.’ UNHCR, ‘Note on International Protection’ (31 August 1993), UN Doc A/AC.96/815 para 20.

4 T Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 2.

5 For background on Australia’s excised territory and Christmas Island, see P Chambers, ‘Society Has Been Defended: Following the Shifting Shape of State through Australia’s Christmas Island’ (2011) 5 *International Political Sociology* 18 and S Kneebone, ‘The Pacific Solution: The Provision of “Effective Protection”?’ (2006) 18 *International Journal of Refugee Law* 696.

6 Migration Act 1958 (Cth).

7 State practice around what constitutes ‘effective protection’ in the context of a ‘safe third country’ differs: see S Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 *International Journal of Refugee Law* 567.

(iv) meets relevant human rights standards in providing that protection [...]

The case centred on whether the plaintiffs could be legally taken to Malaysia, a country that the Minister declared to be a 'specified country'. In the month prior to the plaintiffs' arrival in Australia, Australia and Malaysia had publicly concluded a legally non-binding agreement for the regional processing of asylum seeker claims ('the Agreement').<sup>8</sup> Under the Agreement, Australia would transfer up to 800 people who had arrived irregularly by boat within Australian territory to Malaysia for processing in exchange for permanently resettling 4,000 refugees who had been recognised by the United Nations High Commissioner for Refugees ('UNHCR') as 'most in need of resettlement' and were currently residing in Malaysia. Announced as a 'groundbreaking' agreement, the Australian government emphasised the humanitarian need for Australia to take on 'a greater burden-sharing responsibility' based on ideas of 'collective responsibility and cooperation' whilst combating the exploitation of 'human misery' by 'people-smuggling' and in order to 'stop people risking their lives at sea'.<sup>9</sup> The Agreement, colloquially known in Australia as the 'Malaysia Solution', echoed the previous-government's rightly much-criticised 'Pacific Solution' (implemented between 2001–08) that had seen the detention of asylum seekers and the processing of their claims in Papua New Guinea and Nauru.<sup>10</sup> In a similar vein, the cost of the entire arrangement (estimated at AU\$292 million) would be covered by the Australian Government.<sup>11</sup>

Under the Agreement, Australia would conduct a preliminary assessment of the asylum claims of individuals arriving in Australian excised territories before their transfer to Malaysia in order to identify any 'barriers' to removal and ascertain whether Malaysia was a 'safe third country'. Once in Malaysia the asylum seekers' claims would be processed by UNHCR and, if successful, they would have resettlement options 'pursuant to UNHCR's normal processes'. In effect, this means that those individuals would join the estimated 98,000 people currently recognised as refugees and asylum seekers by UNHCR residing irregularly in Malaysia in precarious conditions, without formally recognised entitlements and with little or no realistic prospect of permanent resettlement options.<sup>12</sup>

While various civil society organisations voiced their concerns about the treatment of refugee communities in Malaysia,<sup>13</sup> the Australian Government welcomed the Agreement for facilitating a new regional cooperation framework that would provide both effective protection for 'genuine' refugees and strengthen regional practices of refugee determination. Although Malaysia is not a party to the Refugee Convention nor does it recognise refugee status in its domestic instruments,<sup>14</sup> under the Agreement, Malaysia committed to treating transferees 'with dignity and respect and in accordance with human rights standards' and not deporting anyone found not to be a refugee back to their country of nationality. In the Minister's affidavit to the Court, he noted his 'understanding' and 'clear belief' that this meant Malaysia 'had made a significant conceptual shift in its thinking' and was 'keen to improve its treatment of refugees and asylum seekers'.<sup>15</sup>

Both plaintiffs were subject to this Agreement and brought proceedings to challenge the lawfulness of their prospective removal under the Migration Act. Specifically, they both claimed that they were persons to whom Australia owed a Refugee Convention obligation, and that they would be persecuted if returned to Afghanistan. Further, that as Shia'a Muslims, they feared persecution in Malaysia on the basis of their religion. In addition, the second plaintiff, as an unaccompanied minor, argued that the Minister - as his legal guardian - needed to give explicit consent for his removal to Malaysia and had additional duties to act in his 'best interest'. It was submitted that removal to Malaysia could not be in his best interests given the range of possible harms he would face.<sup>16</sup> In challenging the domestic legality of the overall arrangements, the plaintiffs'

8 See Joint media release with Julia Gillard, Prime Minister of Australia, and Chris Bowen, Minister for Immigration and Citizenship, 'Australia and Malaysia sign transfer deal' (25 July 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb168739.htm>> accessed 26 June 2012 and 'UNHCR Statement on the Australia-Malaysia Arrangement' (UNHCR, 25 July 2011) <[http://unhcr.org.au/unhcr/index.php?option=com\\_content&view=article&id=220:unhcr-statement-on-the-australia-malaysia-arrangement&catid=35:news-a-media&Itemid=63](http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=220:unhcr-statement-on-the-australia-malaysia-arrangement&catid=35:news-a-media&Itemid=63) and <http://www.un.org/apps/news/story.asp?NewsID=39136&Cr=refugee&Cr1>> accessed 26 June 2012.

9 ibid.

10 The 'Pacific Solution' is estimated to have cost AU\$300 million and the devastating psychological effects on those seeking asylum and subject to prolonged isolation and detention have been well documented: see generally A McNevin, *Contesting Citizenship* (Columbia University Press, 2011) 88.

11 'Australia and Malaysia sign asylum seeker swap deal' (The Guardian, 25 July 2011) <<http://www.guardian.co.uk/world/2011/jul/25/australia-malaysia-immigration-swap-deal>> accessed 26 June 2012.

12 'Figures at a Glance' (UNHCR, April 2012) <[http://www.unhcr.org/my/About\\_Us-@-Figures\\_At\\_A\\_Glance.aspx](http://www.unhcr.org/my/About_Us-@-Figures_At_A_Glance.aspx)> accessed 26 June 2012.

13 See for example 'Malaysia: Refugees arrested, abused and denied right to work' (Amnesty International, 17 June 2010) <<http://www.amnesty.org.au/news/comments/23220/>> accessed 26 June 2012.

14 Malaysia is also not a party to the International Covenant on Civil and Political Rights, or the International Covenant on Economic Social and Cultural Rights, although it is a party to the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child.

15 Quoted in *Plaintiff M70/2011* (n 1) para 29 (French CJ).

16 See Plaintiffs' Outline of Submissions, *Plaintiff M70/2011* (17 August 2011) para 125.

case centered on whether the Minister had acted unlawfully in declaring Malaysia a ‘specified country’. In this sense, their submission was specific to the particular statutory construction of the Australian legislation: its source(s) of power for removal to Malaysia, and the proper interpretation of what constituted the provision of ‘procedures’ and ‘protection’.

The plaintiffs submitted that the criteria stipulated in section 198A(3)(a) of the Act were jurisdictional facts that needed to objectively exist in order to enliven the Ministerial power to declare Malaysia a ‘specified country’, and thus were open to being reviewed by the Court. Consequentially, they argued that the legislative reference to ‘protection’ needed to be construed as denoting a legal obligation in order to make it meaningful, rather than something simply secured through a practical sense or manifestation. The Commonwealth, on the other hand, argued that the only constraint imposed upon the Minister’s declaratory powers when acting under section 198A(3) of the Act was that ‘the power was exercised in good faith and within the scope and purpose of the statute’, independent of the ‘truth’ of the declaration, and that, if the criteria in section 198A(3) of the Act were found to be jurisdictional facts, then the meaning of ‘protection’ and ‘procedure’ were ‘wholly factual’ matters.<sup>17</sup>

### III. The Decision

The Court held by a 6:1 majority that the Minister’s declaration with respect to Malaysia as a ‘specified country’ was invalid under the Act.<sup>18</sup> The case consists of four separate judgments, but for the purpose of this discussion, this paper will primarily explore the joint leading judgment that constitutes the decision of the majority of the Court, although it will also set out the differences in the two concurring judgments.<sup>19</sup>

The majority of the Court found that the criteria under section 198A(3) of the Act were ‘jurisdictional facts’ that needed to be objectively satisfied in order to validly enliven the Minister’s power to declare a ‘specified country’ under the Act. This was primarily because the text of the provision provides the Minister with the discretionary power to declare that a ‘specified country *has* the relevant characteristics’ set out in section 198A(3) of the Act.<sup>20</sup> For the joint judgment, these criteria were a ‘complex of elements’ that *may* contain both a factual component and a legal obligation. For example, the requirement that the declared country meets human rights standards could necessitate a factual examination of ‘what has happened, is happening or may be expected to happen in that country.’<sup>21</sup>

The key question for the majority in the present case was whether the specific legislative requirements in section 198A(3) of the Act - of providing ‘access’ to ‘effective’ refugee determination procedures and providing ‘protections’ to both asylum seekers and refugees - were a question of ‘de facto’ access and protection or had to be a ‘matter of legal obligation’.<sup>22</sup> The majority of the Court held that in order for a declaration to be valid, the declared country must be ‘legally bound’ (either by domestic or international law) to meet the criteria set out in section 198A(3) of the Act,<sup>23</sup> as these needed to be understood as a ‘reflex’ of Australia’s international refugee obligations.<sup>24</sup>

17 *Plaintiff M70/2011* (n 1) para 108 (Gummow, Hayne, Crennan and Bell JJ).

18 Central to the rationale of its decision was the Court’s finding that the Migration Act 1958 (Cth) conveyed only one source of powers for the removal of persons to Malaysia under the Ministerial arrangements, ie the power under section 198A(3) (and not two, as the government submitted). This was supported by reference to both the legislative history and intention of the alternative provision (s 198(2) of the Act). As this argument turns on the specifics of the Australian legislation, it will not be examined in detail here.

19 The four judgments that make up the decision were the joint lead judgment of Gummow, Hayne, Crennan and Bell JJ, the two separate, concurring judgments by Kiefel J and French CJ, and the dissenting judgment of Heydon J.

20 *Plaintiff M70/2011* (n 1) para 106 (Gummow, Hayne, Crennan and Bell JJ) (emphasis in original). Elsewhere in the joint judgment, the Court states that the power given to the Minister needed to be read in terms of the ‘text, context and evident purpose’ of the provision, and the Act as a whole, which was to ‘facilitate Australia’s compliance with the obligations undertaken in the Refugee Convention’ para 98.

21 *Plaintiff M70/2011* (n 1) para 112 (Gummow, Hayne, Crennan and Bell JJ).

22 *ibid* para 115.

23 Hence, this was not simply a factual question about whether the country did in fact provide protection for refugees, but the question of the legal obligations in place binding States to protect refugees and asylum seekers in particular ways.

24 The outcome of this case builds in large part on a previous recent Australian High Court decision regarding off-shore processing that found that people seeking asylum in excised zones were nonetheless entitled to procedural fairness and judicial review of their asylum claims, thus in effect undermining the political intentions behind Australia’s ‘offshore processing regime’. This decision was significant in recognizing that the Migration Act 1958 (Cth) demonstrated a legislative intention on the part of Parliament to uphold Australia’s international obligations under the Refugee Convention, and when read as a whole, ‘contains an elaborate and interconnected set of statutory provisions directed to the purpose of responding to’ Australia’s international obligations with respect to asylum seekers and refugees “by granting a protection visa in an appropriate case and by not returning [a] person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason”. *Plaintiff M61/2010E v The Commonwealth* (2010) 272 ALR 14, cited in *Plaintiff M70/2011* (n 1) para 90 (Gummow, Hayne, Crennan and Bell JJ) para 212 (Kiefel J).

This meant that the Refugee Convention could be used to give meaning to the language of the domestic legislative section.<sup>25</sup> Additionally, the Minister needed to attend to the 'kinds of obligations' undertaken by Australia and other signatories party to the Refugee Convention when determining whether the legal protection framework within a specific country is sufficient in providing both 'access' to effective determination procedures and appropriate 'protection' for both asylum seekers and refugees. Importantly, for the joint judgment, this extended beyond the obligation of *non-refoulement*, and also included other incremental obligations and rights contained within the text of the Refugee Convention that came into effect once refugee status was established. This included: free access to courts (art 16(1)); access to elementary education as accorded to nationals (art 21(1)); certain employment rights (art 17); freedom of religion (art 4); and freedom of residence (art 26). The joint judgment notes, to confine the meaning of 'protection' solely to the 'obligation of *non-refoulement* would give little or no practical operation' to the requirements of the specific Australian legislative provision. Nevertheless the joint judgment recognises that the extent to which some of the Refugee Convention obligations - excluding that of *non-refoulement* - apply to asylum seekers is subject to differing legal opinions under international law. The Court held that while it did not need to adjudicate on this issue, it was certainly necessary and agreed that the specified country must provide 'rights of the kind mentioned in the Refugee Convention' to refugees.

The majority held that, on the agreed facts, Malaysia would not satisfy these legal obligations. This was determined on the basis that Malaysia was neither a party to the Refugee Convention nor did it have any domestic legislative provisions recognising refugees, or 'undertake any activities related to the reception, registration, documentation or status determination of asylum seekers and refugees'.<sup>26</sup> Moreover, as the Agreement was stipulated to be a 'record' of Australia and Malaysia's respective 'intentions and political commitments but [...] not legally binding on the Participants', it did not oblige Malaysia to provide any rights to asylum seekers or refugees and thus could not be seen as creating any obligations under international law.<sup>27</sup> Simply providing, in reality, practical access to UNHCR procedures and concluding that people are not 'ill-treated' at various stages of the determination or resettlement processes was held to be an insufficient basis for the Ministerial declaration.<sup>28</sup> In framing their initial inquiry as a question of what legal obligations were present, the majority ultimately decided that it was not necessary to make any determination about the extent to which a factual inquiry was needed regarding the actual treatment of refugees in Malaysia or whether human rights standards or adequate protections against *refoulement* were in fact upheld.

In a similar vein, Justice Kiefel in her concurring judgment held that protection under section 198A(3) 'must, at the least, be protection against persecution and *refoulement*' in order to uphold Australia's Refugee Convention obligations.<sup>29</sup> For Justice Kiefel, the question of who conducts the status determination process was significant, finding that it was not a sufficient 'safeguard' for a non-governmental organisation - in this case, the UNHCR - to do so as this left the process open to be 'determined by any means'. Rather, section 198A(3) of the Act factually requires the declared country to be the 'provider of protections', which would then be 'bound to [the refugee determination] outcome'.<sup>30</sup> This, in an extension of the joint judgment, necessitated an examination of that country's laws and practices of refugee protection.<sup>31</sup> At a very minimum, there needed to be legal provisions obliging a country to recognise and protect refugees, and once this was established, it might also be relevant to consider how these laws were 'carried into effect'. For Justice Kiefel, the 'state of affairs' in Malaysia did not fulfil this objective factual requirement, with there being, despite the Agreement between Australia and Malaysia, no domestic laws in place to recognise and protect refugees from *refoulement* or persecution.

While the Chief Justice also found that the Ministerial declaration was subject to jurisdictional error, he differed from the majority in his construction of the necessary jurisdictional facts. While the majority found that the jurisdictional facts are 'objective' criteria that need to exist in order for the Minister to make a valid declaration, Chief Justice French held that the provision would be validly enlivened when the Minister 'form[ed], in good faith, an evaluative judgment' based upon a proper construction of the criteria in section 198A(3). This meant that the courts could not 'substitute their judgment for that of the Minister'. A jurisdictional error could still occur however, according to Chief Justice French, if the Minister improperly construed the criteria by incorrectly approaching the questions he asked himself.<sup>32</sup> In this regard the temporal

25 *Plaintiff M70/2011* (n 1) para 118 (Gummow, Hayne, Crennan and Bell JJ).

26 *Plaintiff M70/2011* (n 1) para 135 (Gummow, Hayne, Crennan and Bell JJ).

27 *Plaintiff M70/2011* (n 1) para 126 (Gummow, Hayne, Crennan and Bell JJ).

28 *Plaintiff M70/2011* (n 1) para 135 (Gummow, Hayne, Crennan and Bell JJ).

29 *Plaintiff M70/2011* (n 1) para 240 (Kiefel J).

30 *Plaintiff M70/2011* (n 1) para 241 (Kiefel J).

31 Kiefel J recognised that the Refugee Convention allows governments to establish their own refugee determination procedures, which may vary.

32 *Plaintiff M70/2011* (n 1) para 60 (French CJ).

dimension of how the Minister approached his characterisation of Malaysia was crucial: the Minister needed to base his decision upon an evaluation of whether Malaysia had permanent legal infrastructure that could be constituted as ‘present and continuing circumstances’.<sup>33</sup> This means that it could not be a declaration made with respect to ‘merely transient’ conditions or ‘a hope or belief or expectation’ about actions Malaysia would take in the future. Rather, a declaration needed to be based on a conviction about the ‘enduring legal frameworks’ of the specified country, including an ‘effective judicial system capable of enforcing those laws’.<sup>34</sup> For Chief Justice French, the next crucial question the Minister needed to ask himself was whether Malaysian laws and practices sufficiently adhered to ‘international obligations, constitutional guarantees and domestic statutes’ for the provision of access and protection. Given the ‘apparent legal fragility’ of the arrangements, Chief Justice French held that it was clear that the Minister ‘did not look to, and did not find, any basis for his declaration in Malaysia’s international obligations or relevant domestic laws’.<sup>35</sup>

#### IV. Commentary

While much of the success of this case ultimately depended upon the particular statutory construction of the Australian legislation, the meaning given to domestic legislation dealing with the provision of ‘access’ and ‘protection’ - that is, as legal concepts that must be interpreted so as to give effect to a range of Refugee Convention obligations - was significant.<sup>36</sup> It, in effect, affirmed UNHCR’s position that ‘international solidarity and burden-sharing’ should not function as a form of ‘burden-shifting’ that diminishes the responsibilities of host countries.<sup>37</sup> It also went some way toward taking seriously the concerns of refugees, scholars and advocates about the insufficiency of *de facto* protection when transferring asylum claims to third countries. This was particularly true with regard to the need for the host country to undertake its own rigorous preliminary assessment concerning whether protection obligations would be negatively affected in light of both the specific circumstances of the asylum seeker and the broader legal framework and factual situation in the destination country.<sup>38</sup> Although the Australian Government subsequently tried to facilitate the implementation of the Malaysia Agreement by introducing legislation into Parliament that would replace the criteria stipulated in section 198A(3) with a broader requirement that the declaration of a ‘specified country’ be in ‘the public interest’,<sup>39</sup> in the end they were unsuccessful in gaining Parliamentary support for this amendment. Had the amendment passed, the practical implications of the present decision for those subject to Australia’s offshore processing regime would have been largely curtailed.

The Australian government’s attempted implementation of the ‘Malaysia Solution’ has rightly been criticised for its attempt to trade in human lives under the guise of ‘burden sharing’ and combating irregular migration. Through this calculated exchange, it is the bodies and lives of those seeking asylum that become instrumentalised for the sake of shoring up national borders and reinstating a particular State-sanctioned ‘hierarchy of mobility’, which codes the figure of the ‘refugee’ for specific governmental purposes.<sup>40</sup> In this sense, the Agreement was less about excluding refugees from the space of the Australian nation *per se* (as the arrangement would actually have seen an increase in the number of refugees resettled in Australia through the intake from Malaysia), but more about fundamentally perpetuating the impossible fantasy of securing borders by ‘stopping the boats’ and policing the distinction between those deemed entitled to the protection of the Australian State (those scripted as ‘genuine’ or more ‘needy’ refugees residing in Malaysia) and those who may be disregarded, abused and considered unworthy (those who arrive by unauthorised means in Australia). Despite the fact the majority of refugees residing in Malaysia do so without the sanction of domestic law and would also have arrived in ways deemed ‘irregular’ by the State, it was to this latter category of people, those who risk their lives to journey to Australian territory rather than remaining where they implicitly ‘should’, that the ‘legal fiction’ of non-arrival in Australia for the purposes of migration was applied and who were subject to a different regime characterised by ministerial discretion. Here we can see the foundational productive work - and violence - of sovereignty, which creates ‘a space of the absence of law (the offshore border) in which sovereign power can nonetheless remain absolutely enforceable over the body of the legally absent but physically present asylum seeker.’<sup>41</sup>

33 *Plaintiff M70/2011* (n 1) para 61 (French CJ).

34 *Plaintiff M70/2011* (n 1) para 61, 66 (French CJ).

35 *Plaintiff M70/2011* (n 1) para 66 (French CJ).

36 For an analysis of the effects of *Plaintiff M70/2011* for international refugee law, see T Wood and J McAdam, ‘Australian Asylum Policy All at Sea’ (2012) 61 *International and Comparative Law Quarterly* 274.

37 Executive Committee UNHCR, ‘International Solidarity and Burden-Sharing in all its Aspects’ UN Doc A/AC.96/904 (7 September 1998) para 28.

38 See Legomsky (n 7) 592–594.

39 See Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 (Australia) <[http://www.minister.immi.gov.au/media/media-releases/\\_pdf/migration-act-legislative-amendments.pdf](http://www.minister.immi.gov.au/media/media-releases/_pdf/migration-act-legislative-amendments.pdf)> accessed 26 June 2012. The government, lacking in numbers or multi-party support, subsequently withdrew the proposed amendments on 13 October 2011.

40 Z Bauman, *Globalization: The Human Consequences* (Polity Press, 1998) 69.

41 D Farrier, *Postcolonial Asylum: Seeking Sanctuary Before the Law* (Liverpool University Press, 2011) 33. See also G Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press, 2007) 207.

On a different level, the governmental push for regional refugee processing arrangements - depicted by both Malaysia and Australia as the implementation of a practical consensus reached through the International Organisation for Migration facilitated regional consultation process - could be seen as symptomatic of a broader 'anti-formalist' turn in international law and governance. This functionalist approach prioritises the technical administration of subject-specific regimes through forms of *de facto* authority (through the language of 'regional harmonisation' and the implementation of institutionally-facilitated mechanisms of refugee recognition) over the more fundamental questions about self-hood and inter-subjective relations, which have at their core political questions about the formation of political or sovereign communities, the instigation of borders demarcating forms of belonging, and the allocation of resources and the distribution of rights within.<sup>42</sup> This could be seen in the idea of burden-sharing, as put forward by the Australian Government, which emphasised practical access over *de jure* entitlements and sought to derive its legitimacy by scripting the arrangement through the language of international moral obligation and humanitarianism. In doing so, the discourse of burden-sharing mobilised a dynamic of depoliticisation that sought to 'compensat[e] for the social violence embodied in the regime of migration control',<sup>43</sup> thereby disavowing the various State practices that instigate and police borders as forms of violence in themselves. Or more fundamentally, as Roslyn Lui has written, it forecloses the fact that the international refugee regime has 'as its "core business" the preservation of the value of the nation-state form and the institution of national citizenship' that, in turn, is constitutive of the very figure of the refugee.<sup>44</sup> It is through the State system that a 'previously bewildering conglomeration of bodies is named, categorised, and regulated' so as to facilitate differential forms of inclusion within the space of the nation, and thus authorise particular practices of statecraft that have exclusionary effects. Thus, structural inequalities, social dispossession or political conflicts instigated through the nexus between citizenship, borders and the territorial State appear in refugee law as matters of individualised personal suffering and persecution that could be rectified by a framework that enabled both functional cooperation for the sake of regional harmonisation as well as the processing of individual claims.

To return to the specifics of the *Plaintiff M70/2011* decision, the case certainly demonstrated the potential uses of international and domestic refugee law for holding States accountable for protecting the rights of particular groups of refugees and instigating contestatory politics around the limits of State sovereign actions. And yet, we can also read the case for its productive recoding of the relations between sovereignty, authority, territory and identity, with the text of the decision being one constitutive site for the remaking of particular ideas of the Australian nation.<sup>45</sup> Both the governmental attempt to implement the Malaysia Solution and the particular denial offered by the High Court through the language of law could be read as acts of 'place-making', which, in the words of Prem Kumar Ragan, engage in practices involving the 'formation, securitisation and consecration' of the Australian territorial nation 'through the strengthening of Australian 'place' and the consequent derogation' of other places. So, while the judges in the *Plaintiff M70/2011* decision were at pains to make clear that they were not making any factual determination about the extent of refugee protection in Malaysia (beyond a question of whether effective legal obligations were in place), nonetheless the judgment implicitly codes Australia as a place of lawfulness and human rights, a place that takes seriously the provision of effective access to refugee determination procedures and the legal protections of those seeking asylum and recognised as refugees, while Malaysia spectrally figures as the inverse.<sup>46</sup> Central to this characterisation is the implicit correlation between effective legal frameworks and the protection of rights - that is, the depiction of law and the sovereign as 'protectors' rather than as constituting dynamics of exclusion, or differential inclusion.<sup>47</sup> Rather than engaging directly with this representation, this paper seeks to bring to the fore the effects of this case on the plaintiffs themselves. While they presently cannot be deported to Malaysia, they remain in immigration detention on Christmas Island, ironically without any State recognition of the procedural 'right' to apply for asylum, and remain subject to exclusionary technologies and practices of statecraft for generating their 'deportability'.<sup>48</sup> Their continued detention starkly symbolises, in the words of Galina Cornelisse, the 'means through which the nation-state, despite celebrations of universal human rights and assertions of post-national citizenship, violently guard the rigid link between territory, identity and rights'

42 M Koskenniemi, 'What Use for Sovereignty Today' (2011) 1 *Asian Journal of International Law* 61, 69.

43 W Walters, 'Foucault and Frontiers: Notes on the Birth of the Humanitarian Border' in Bröckling and Krasmann (eds) *Governmentality: Current Issues and Future Challenges* (Routledge, 2011) 138.

44 R Lui, 'Governing Refugees 1919-1945' (2002) 1(1) <[http://www.borderlands.net.au/vol1no1\\_2002/lui\\_governing.html](http://www.borderlands.net.au/vol1no1_2002/lui_governing.html)> accessed 26 June 2012. See also L Malkki, 'Refugees and Exiles' (1995) 24 *Annual Review of Anthropology* 495.

45 P Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press, 2002) 129.

46 And yet see the ways in which law facilitates and enables particular violences, eg *Al-Kateb v Godwin* [2004] HCA 37, which held that a stateless person could be indefinitely detained by the executive.

47 On the concept of differential inclusion, see S Mezzadra and B Neilson, 'Border as Method, or, the Multiplication of Labor' (March 2008) *Transversal* <<http://eicpc.net/transversal/0608/mezzadraneilson/en>> accessed 26 June 2012.

48 McNevin (n 10) 86. N Genova and N Peutz (eds) *The Deportation Regime: Sovereignty, Space and the Freedom of Movement* (Duke University Press, 2010).

by creating a 'place for those who do not fit within the global territorial ideal.'<sup>49</sup> For Cornelisse, it is in the multiplicity of attempts that challenge or 'destabilise' these rigid links that a more progressive politics could emerge, one that negotiates forms of authority, belonging and place in less exclusionary and violent means than that facilitated through the contemporary discourses and use of offshore processing mechanisms and burden-sharing that see the *de facto* outsourcing of Convention obligations. Perhaps *Plaintiff M70/2011* opens up a space for just this. ■

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49 G Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers, 2010) 243.