Inquiry into the Incident at the Manus Island Detention Centre from 16 to 18 February 2014

Submission to the Senate
Legal and Constitutional Affairs
References Committee

UNSW AUSTRALIA

Andrew & Renata Kaldor Centre for International Refugee Law

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2 May 2014

Dear Committee Secretary,

The Andrew & Renata Kaldor Centre for International Refugee Law welcomes the opportunity to provide a submission to the Committee's Inquiry into the Incident at the Manus Island Detention Centre from 16 to 18 February 2014.

The Kaldor Centre is Australia's foremost research centre on international refugee law. Based in the Faculty of Law at UNSW, it was established in 2013 with the aim of bringing a principled, evidence-based approach to the issue of refugee law and policy in Australia.

Our submission addresses paragraphs (k) and (l) of the terms of reference, namely:

- the Australian Government's duty of care obligations and responsibilities; and
- refugee status determination processing and resettlement arrangements in Papua New Guinea.

In summary, it is our assessment that:

- the Australian Government may have breached its duty of care towards asylum seekers held in the detention centre;
- the Australian Government may have violated its international legal obligations in respect of the rights to life, liberty and security, and its obligation to ensure that no one is subjected to torture or other cruel, inhuman or degrading treatment or punishment; and
- the inadequacy of refugee status determination on Manus Island and the policy of resettlement in Papua New Guinea create real risks that international legal obligations will be violated.

If we can provide further information, please do not hesitate to contact us: kaldorcentre@unsw.edu.au.

Yours sincerely,

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Director

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1 Overview

1. The Andrew & Renata Kaldor Centre for International Refugee Law welcomes this Inquiry into the incident at the Manus Island Detention Centre from 16 to 18 February 2014. An independent and public inquiry is essential when people are injured and killed in immigration detention. An important function of this Inquiry is to establish exactly what happened. We know that this 'incident', arising out of the suppression of unrest in the Centre, resulted in multiple injuries to asylum seekers and the death of Reza Barati. What this Inquiry will establish, we hope, is who was responsible for causing those injuries, and how they occurred.

2. Another important function of this Inquiry is to examine not only the legal consequences of the incident on Manus Island, but also Australia's international responsibilities and their application to the arrangements between Australia and Papua New Guinea (PNG).[1] In summary, we consider that there have been, and/or that there remain significant risks of, multiple breaches of Australia's legal obligations in relation to refugee status determination (RSD) processes on Manus Island, and offshore processing more generally.

3. In relation to the incident on Manus Island, we submit that the following legal obligations may have been breached by Australia:

- its **non-delegable duty of care** to ensure care is taken with respect to the safety of asylum seekers on Manus Island;
- its obligation to respect the **right to life** of asylum seekers on Manus Island;
- its obligation to respect the **right to security** of asylum seekers on Manus Island;
- its obligation to respect the **right to liberty** of asylum seekers on Manus Island; and
- its obligation to ensure that no one is subjected to **torture or other cruel, inhuman or degrading treatment or punishment**.

4. A major underlying cause of the incident is the inadequacy of the RSD processes on Manus Island, which fall short of minimum international standards and Australian practice. The processes are currently so inadequate as to create a real risk of *refoulement* in violation of Australia and PNG's obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention),[2] the International Covenant on Civil and Political Rights (ICCPR).[3] Further, the processes also create a risk of violating Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[4]

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[1] 'Regional Resettlement Arrangement between Australia and Papua New Guinea' (19 July 2013) <https://www.dfat.gov.au/geo/png/regional-resettlement-arrangement-20130719.html>; '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' (6 August 2013) <https://www.dfat.gov.au/geo/png/joint-mou-20130806.html>.

[2] Convention Relating to the Status of Refugees (opened for signature 28 July 1951, 189 UNTS 150, entered into force 22 April 1954); Protocol Relating to the Status of Refugees (opened for signature 31 January 1967, 606 UNTS 267, entered into force 4 October 1967).

[3] International Covenant on Civil and Political Rights (opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976).

[4] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 4 February 1985, 1465 UNTS 85, entered into force 26 June 1987).

5. This Inquiry should also recognize that the policy of offshore processing inherently creates a significant risk of violations of Australia's international legal obligations, including *refoulement*, penalization for illegal entry, arbitrary deprivation of liberty, restrictions on freedom of movement, and torture or other cruel, inhuman or degrading treatment or punishment.

6. Finally, we submit that the resettlement of refugees in PNG does not constitute a durable solution and will likely create secondary movements of refugees and breaches of human rights law.

2 Outline of submission

7. Our submission relates to paragraphs (k) and (l) of the terms of reference, namely:

- the Australian Government's duty of care obligations and responsibilities; and
- refugee status determination processing and resettlement arrangements in Papua New Guinea.

8. We note that the facts relating to the incident on Manus Island themselves have yet to be clearly established, including who caused the injuries to asylum seekers and the death of Reza Barati. Our legal analysis proceeds on the assumption that the injuries and death were caused either by security guards employed by the contractors then responsible for administering the Centre (G4S), or by PNG authorities, or a combination of both. In relation to detention conditions and RSD processes on Manus Island, we rely on the reports from UNHCR and Amnesty International in 2013.[5] These are summarized in the Kaldor Centre's factsheet on offshore processing conditions, available at http://www.kaldorcentre.unsw.edu.au and **attached** to this submission.

9. This submission is divided into three sections. First, the submission examines Australia's domestic and international legal obligations in relation to the incident that is the subject of this Inquiry. Secondly, the submission examines Australia's legal obligations in relation to RSD on Manus Island. Thirdly, the submission examines Australia's legal obligations in relation to offshore processing more generally.

[5] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea' (26 November 2013) <http://www.refworld.org/docid/5294aa8b0.html>; Amnesty International, 'This Is Breaking People : Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea' (ASA 12/002/2013, 13 December 2013) <www.amnesty.org/en/library/asset/ASA12/.../asa120022013en.pdf>.

3 Incident on Manus Island

3.1 Domestic legal obligations

Summary: The Australian Government could be liable to compensate asylum seekers for the injuries sustained in the incidents, on the basis that the Australian Government breached its non-delegable duty of care to those on Manus Island. The contractors then responsible for security, G4S, are also likely to be liable in negligence for its apparent failure to provide adequate security for those held in immigration detention on Manus Island.

These claims could be pursued in Australian courts, but would be adjudicated according to PNG law. However, PNG law does incorporate the common law of negligence.

Further, G4S or the PNG authorities (depending on the facts) are probably vicariously liable for the torts of battery and assault. The individuals responsible for the violence would be directly liable for such torts, and also are likely to have committed various crimes under PNG law.

3.1.1 Negligence

10. The evidence strongly suggests that the contractor responsible for security, G4S, committed the tort of negligence by failing to provide adequate security to protect asylum seekers from harm. The tort of negligence is committed when a person (including a legal person) has a duty of care to others, breaches that duty, and damage is caused.

11. Whether a person owes a duty of care to another depends on the relationship between them. A very clear example is where a person is in the custody of another, such as in hospitals, prisons and detention centres. It is therefore beyond doubt that, as contractors responsible for the security and safety of those detained, G4S relevantly owed a duty of care to those detained. There is also no doubt that damage, in the form of injuries and the death of Reza Barati, was caused.

12. The only question, therefore, is whether G4S breached its duty of care, by failing to take reasonable care of those detained, including their physical safety. In assessing the reasonableness of the care taken, it is necessary to examine factors including: the foreseeability of the risks of unrest; the precautions taken to mitigate those risks and the possible effects of unrest, such as appropriate policies and procedures, facilities, equipment, recruitment and training of staff; the actions taken by G4S staff, and any failures to act, that may have increased the risk of injuries during the incident itself. These are matters, of course, that are the subject of this Inquiry.

13. The Australian Government could also be liable on the basis that it has a 'non-delegable duty of care' to those detained on Manus Island. 'Non-delegable duties' typically arise in situations where a person has the care, supervision or control of another person in such a way that there is a particular responsibility for their safety (for example, hospitals and patients). If a 'non-delegable duty' exists, then the Australian Government could not rely upon its employment of a qualified independent contractor to discharge its duty of care to the detainees. Rather, the Australian Government itself was required to ensure that care would be taken and is liable for any breach of that duty of care.

14. Importantly, the Australian Government has previously been found to have a 'non-delegable duty of care' in relation to immigration detainees within Australia.[6] Indeed, in that case the Commonwealth itself conceded that fact.

15. The asylum seekers detained on Manus Island, like those detained in Australia, are held both on behalf of the Commonwealth and by the Commonwealth. In considering whether a duty of care applies in the present case, the courts are likely to consider as highly relevant the Australian Government's direct contractual relationship with service providers at the Centre and its funding of the Centre, notwithstanding PNG's formal responsibility for administering the Centre.[7] At the very least, given the facts, it is likely that Australia would share legal responsibility with the PNG Government for the care of those on Manus Island.

16. Alternatively (although this is less likely), the Australian Government could be vicariously liable in respect of G4S's negligence. The principal difficulty with this argument is that G4S is likely to be treated as an independent contractor rather than an employee for this purpose, taking all the relevant circumstances into account.[8]

17. As well, the torts of battery and assault appear likely to have been committed by individuals.[9] Depending on the facts, defences (self-defence, defence of others, and necessity) may apply. However, these defences require some degree of proportionality in the extent of the force used.

18. Since these torts were likely committed by employees of G4S or the PNG Government, they were probably committed 'in the course of employment'. This means that G4S and the PNG Government, as their employers, would be vicariously liable for such acts,[10] since they were responsible for security in relation to the asylum seekers and the torts were committed in the course of performing security tasks.[11]

3.1.2 Relevance of torts being committed in PNG

19. The fact that these torts were committed abroad does not affect this conclusion. That fact is relevant to the choice of law, rather than to the existence of the legal responsibility itself.

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[6] *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* (2005) 143 FCR 217, [199].

[7] See 'Regional Resettlement Arrangement between Australia and Papua New Guinea', above n 1; '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', above n 1.

[8] For example, the level of control over the manner of work, the identification of the contractor as a representative, the financial relationship, and the role of deterrence, and the ownership of assets: see, eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

[9] The tort of battery is committed by directly and intentionally or negligently 'bringing about a harmful or offensive contact with the person of another', while the tort of assault is committed by intentionally or probably negligently 'creating in another person an apprehension of imminent harmful or offensive contact: Harold Luntz et al, *Torts: Cases and Commentary* (Lexis Nexis, 7th ed, 2012) 621.

[10] *New South Wales v Lepore* (2003) 212 CLR 511.

[11] Ibid esp [53]–[54] per Gleeson CJ. There, Gleeson CJ gave the example of a security guard being liable for removing a person with unnecessary force.

20. Under Australian law, the relevant law to be applied would be the law of PNG.[12] Since the law of PNG incorporates the common law relating to negligence, the key principles to be applied are likely to be similar.[13]

21. Such a claim could be brought in Australia unless Australia was a 'clearly inappropriate' forum.[14] The factors to be considered in determining this include the connection between Australia and the subject matter of the action and/or the parties, including where they live and work and where the torts were committed, and the convenience or expense of witnesses; the possible legal advantages to the plaintiff; and whether Australia would apply the law of PNG or foreign law.[15] In the present case, given the connections between the action and Australian parties, it is unlikely the court would consider Australia to be a 'clearly inappropriate' forum.

3.1.3 Criminal responsibility of individuals involved

22. Finally, it is important to remember that the individuals involved are also likely to be criminally responsible for their acts. Various criminal offences under PNG law appear to have been committed, including negligent acts causing harm,[16] assault,[17] causing or intending to cause grievous bodily harm,[18] and homicide[19] (including attempts to kill[20] and inciting to kill).[21] While there are defences available in respect of these offences — including, relevantly, defences of preventing a breach of the peace,[22] suppressing a riot,[23] self-defence, and aiding in self-defence[24] — these all require a degree of proportionality between the force used and the danger posed.[25]

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[12] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491.
[13] Azadeh Dastyari, 'Out of Sight Out of Right? Who Can Be Held Accountable for Detainees Harmed on Nauru?' in Babacan Alperhan and Linda Briskman (eds), *Asylum seekers: International Perspectives on Interdiction and Deterrence* (Cambridge Scholars Publishing, 2008) 82 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245485>.
[14] Martin Davies, Andrew S Bell and Paul Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9th ed, 2013) [8.18].
[15] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197.
[16] *Criminal Code Act 1974* (PNG) s 327.
[17] Ibid ss 244, 335, 340, 341. The different offences depend on different levels of intent and consequence. An assault is defined as any direct or indirect contact to the person of another without consent or consent obtained by threats, and includes attempts or threats of force (under the common law, known as battery): s 243.
[18] Ibid ss 315, 319.
[19] Ibid s 289.
[20] Ibid s 304.
[21] Ibid s 308.
[22] Ibid s 258.
[23] Ibid ss 259–263.
[24] Ibid ss 269–270.
[25] In relation to defences of preventing a breach of the peace or suppressing a riot, the defences protect only such force as is both necessary to effect the protected purpose, and reasonably proportioned to the danger. In relation to self-defence, if death or grievous bodily harm results, the defence is only available where the original assault reasonably caused a person to apprehend death or grievous bodily harm and reasonably believed it was necessary to use force to prevent such harm, and such force was in fact necessary or reasonably necessary for this defence or preservation.

3.2 International legal obligations

Summary: The Australian Government remains responsible for breaches of international law under the arrangements with PNG. These include apparent breaches of the right to life, the right to security, and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, in respect of the incidents on Manus Island.

3.2.1 International legal responsibilities

23. Under the law of State responsibility, a State cannot contract out of its international legal obligations.[26] This includes delegating asylum processing to other States, as was emphasized recently by the Grand Chamber of the European Court of Human Rights, when it stated that Italy could not contract out of its international obligations through a bilateral agreement to transfer irregular migrants to Libya.[27]

24. Liability for breaches of international law can be both joint and several.[28] A State that aids or assists, directs or controls, or coerces another State to commit an internationally wrongful act is also responsible if it knows the circumstances of the wrongful act, and the act would be wrongful if that State committed it itself. Furthermore, an internationally wrongful act is attributable to a State if it is committed by a legislative, judicial or executive organ of government, or a person or entity which, although not a government organ, has nonetheless been delegated certain aspects of governmental authority (even if that person or entity exceeds the actual authority they have been given or goes against instructions).

25. Therefore, given Australia's involvement in the transfer, management and possible processing of asylum seekers in PNG, Australia remains responsible for any violations of international law relating to their treatment under the Refugee Convention, general international law, and human rights law. At the very least, Australia would be jointly responsible with PNG for internationally wrongful acts – a view shared by UNHCR[29] and Australia's Parliamentary Joint Committee on Human Rights.[30]

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[26] UN Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (UN Doc CCPR/C/21/Rev.1/Add.13, 29 March 2004) [10]; 'Concluding Observations of the Human Rights Committee: Israel' (UN Doc CCPR/C/79/Add.93, 18 August 1998) [10]; 'Concluding Observations of the Human Rights Committee: United States of America' (UN Doc CCPR/C/79/Add.50, 6 April 1995) [284].

[27] *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, para 129. See further Guy Goodwin-Gill, 'Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations, The' (2007) 9 *UTS Law Review* 26; Violeta Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 *Human Rights Law Review* 574.

[28] International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) arts 16–18.

[29] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [16].

[30] Parliamentary Joint Committee on Human Rights, 'Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and Related Legislation' (9th Report of 2013, 19 June 2013) [2.56].

3.2.2 The right to life: Article 6 of the ICCPR and PNG Constitution

26. Both Australia and PNG are parties to the ICCPR. Article 6 of the ICCPR protects the right to life, which includes obligations to: prevent and punish deprivation of life by criminal acts; prevent arbitrary killing by security forces; take appropriate steps to safeguard the lives of those within their jurisdiction; and establish effective procedures for investigating deprivations of life by the State.[31] These obligations apply in respect of both citizens and non-citizens.[32]

27. Section 35 of the PNG Constitution also protects the right to life, and requires that no person 'shall be deprived of his life intentionally'. However, there are some relevant exceptions, similar to the defences in PNG's criminal law outlined at para 22 above.[33]

28. If Reza Barati was killed by people acting on behalf of the State (whether by employees of G4S or PNG authorities), the State's obligations would be engaged under article 6 of the ICCPR. Under international law, the State remains responsible for the acts of persons acting on governmental authority, whether or not these are State officials as such, and whether or not the acts exceeded authority or contravened instructions.[34]

29. In establishing a violation, the burden of proof does not rest solely on the person alleging the violation, especially where the State alone has access to the relevant information. In such cases, it is for the State to provide plausible explanations for injuries and deaths that occurred during such custody.[35]

30. Furthermore, States have an obligation to take appropriate steps to safeguard the lives of those within their territory and/or jurisdiction. The same facts that may suggest negligence on the part of G4S suggest that there may have been a violation of this obligation.

31. Finally, the right to life gives rise to an obligation to investigate deaths that may have occurred in breach of the ICCPR.[36] In general, this obligation requires the inquiry to be:

- both institutionally and practically independent;
- capable of determining whether force was justified and identifying and punishing those responsible;
- prompt and reasonably expeditious; and
- include a sufficient degree of public scrutiny, including involving any next-of-kin.[37]

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[31] UN Human Rights Committee, 'General Comment No. 6: Article 6 (The Right to Life)' UN Doc HRI/GEN/1/Rev.9 (Vol. I) 176.
[32] UN Human Rights Committee, 'General Comment No. 15: The Position of Aliens under the Covenant' UN Doc HRI/GEN/1/Rev.9 (Vol. I) 89 [7].
[33] Relevantly, these include: 'as the result of the use of force to such an extent as is reasonable in the circumstances of the case and is permitted by any other law', 'for the defence of any person from violence', 'in order to effect a lawful arrest or to prevent the escape of a person lawfully detained', 'for the purpose of suppressing a riot, an insurrection or a mutiny' or 'in order to prevent him from committing an offence'.
[34] International Law Commission, above n 28, arts 5, 7, 9.
[35] See, eg, 'Bousroual v Algeria' (Communication No. 992/2001, 24 April 2006) [9.4]; *Salman v Turkey* [2000] EHRR 425, para 99.
[36] 'Andreu v Colombia' (Communication No. 563/1993, 3 November 1995) [8.6]; *McCann v United Kingdom* (1995) 21 EHRR 97.
[37] *Paul and Audrey Edwards v United Kingdom* (2002) 35 EHRR 19, [69]–[73].

32. While the present Inquiry assists in fulfilling this obligation, it remains necessary for the criminal investigations currently underway in both Australia and PNG to identify and punish those responsible.

3.2.3 The right to security

33. The facts also suggest that both Australia and PNG may have violated article 9 of the ICCPR, which protects the right to security of the person. This right 'concerns freedom from injury to the body and the mind, or bodily and mental integrity', and is guaranteed to everyone, including refugees and asylum seekers.[38]

34. The right is clearly violated if State officials (or those acting on behalf of the State) unjustifiably inflict bodily injury on detained people.[39] The injuries sustained by the asylum seekers suggest that this right is likely to have been violated.

35. Further, States should also prevent and redress unjustifiable use of force in law enforcement, and protect their populations against abuses by private security forces.[40] Therefore, it remains necessary for both Australia and the PNG to ensure that there is adequate redress for any such violation, and to implement any required changes to policies, practices and facilities in order to protect asylum seekers from further violations.

3.2.4 Torture or other cruel, inhuman or degrading treatment or punishment

36. There may also have been a violation of the prohibition against torture or other cruel, inhuman or degrading treatment (see CAT and article 7 of the ICCPR). The prohibition is complemented by article 10(1) of the ICCPR, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[41]

37. Torture is defined in article 1 of CAT to mean:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

38. The prohibition on torture in article 7 of the ICCPR does not contain the public official/sanction requirement. The prohibition on torture is also recognized as one of the most fundamental legal principles under customary international law (a peremptory or *jus cogens* norm) that binds all States, irrespective of whether or not they have ratified the relevant treaties.

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[38] UN Human Rights Committee, 'Draft General Comment No. 35, Article 9: Liberty and Security of Person' UN Doc CCPR/C/107/R.3, 28 January 2013 [3].
[39] Ibid [8].
[40] Ibid.
[41] UN Human Rights Committee, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' Un Doc HRI/GEN/1/Rev.9 (Vol. I) 200 [2].

39. Torture is one of the most severe forms of ill-treatment. International law also prohibits cruel, inhuman and degrading treatment. International and comparative law does not tend to draw sharp distinctions between these three types of ill-treatment, and often decision-makers do not specify precisely which category the ill-treatment falls into. Typically, any distinctions that are drawn are made on the basis of the treatment's nature, severity and purpose.[42] Torture or cruel, inhuman or degrading treatment or punishment can take many forms. Assessing whether treatment satisfies this definition requires considerations of all the factual circumstances, including not only the physical injuries but also mental suffering, the conditions of detention as well the context of detention by a State and the vulnerability of the asylum seeker. In this case, the conditions of detention documented by UNHCR and Amnesty International, including the mental suffering caused by the prolonged uncertainty relating to processing and resettlement, would increase the seriousness of any physical acts that resulted in injuries and death during the incident itself.

40. The obligation of the State extends beyond prohibiting such ill-treatment, but also requires Australia to take positive steps to prevent such ill-treatment. These include obligations:

- to educate and inform persons responsible for detention of the prohibition against torture or other cruel, inhuman or degrading treatment;
- to include the prohibition in any rules or instructions issued to such persons;
- to keep under systematic review arrangements for the custody and treatment of those detained with a view to preventing such treatment;
- to ensure authorities conduct a prompt and impartial investigation whenever there is reasonable ground to believe such treatment has occurred; and
- to ensure that individuals alleging such ill-treatment have the right to complain to, and have the case promptly and impartially examined by, competent authorities, including protection of the complainant and witnesses from ill-treatment or intimidation as a consequence of any evidence given.[43]

41. In assessing a violation of these obligations, therefore, it is necessary to consider the training of security staff, their procedures, rules and instructions, and the arrangements for ensuring humane treatment of asylum seekers. As well, the current investigations into the incident need to be prompt and impartial, and protect witnesses from ill-treatment or intimidation. Finally, there needs to be clear procedures to enable asylum seekers to complain of such ill-treatment and obtain an effective remedy.

3.2.5 Right to an effective remedy and reparation

42. Australia is also required to provide an 'effective remedy' to vindicate rights under the ICCPR, as well as reparation for any violations of rights under the ICCPR.[44] The right to an effective remedy includes access to judicial or administrative processes to vindicate

[42] Ibid [4].
[43] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, above n 4, arts 10–13, 16; UN Human Rights Committee, 'General Comment No. 20', above n 41, [10]–[14].
[44] Art 2(3).

rights, as well as administrative mechanisms to ensure prompt, thorough and effective investigations of alleged violations by independent and impartial bodies.[45]

43. The right to an effective remedy also includes a general obligation to provide reparation to victims of violations. Reparation can involve restitution, rehabilitation or measures of satisfaction such as public apologies and changes in relevant laws and practices, and also generally requires appropriate compensation.[46] Further, the right encompasses a duty to prevent recurrences of violations, which may require measures such as changes to a State's laws or practices.[47]

44. Remedies that may be required in relation to the incident on Manus Island, therefore, are likely to include compensation for those injured, changes to procedures and practices, public acknowledgment of violations, and the institution of an effective complaints mechanism for those on Manus Island.

4 Refugee status determination (RSD) process

4.1 Concerns about the RSD process

Summary: The processes on Manus Island for determining refugee status fall far short of acceptable international standards of procedural fairness. If one compares the current cohort of asylum seekers on Manus Island (based on country of origin) with a similar cohort in Australia, refugee recognition rates in Australia would suggest that, under a fair RSD process, most asylum seekers on Manus Island should be recognized as refugees.

45. It is highly probable that an underlying cause of the incidents on Manus Island was the inadequacy of the RSD process in PNG. Both Amnesty International and UNHCR in their reports of 2013 strongly suggest that the lack of information available about the RSD process, significant delays in processing, and the failure to communicate timeframes were contributing causes to the uncertainty and consequential mental harm to asylum seekers on Manus Island.[48]

46. In its 2013 report, UNHCR concluded that the RSD process on Manus Island 'did **not** provide a fair, efficient and expeditious system for assessing refugee claims'.[49] In particular, UNHCR raised concerns relating to the legal framework for RSD in PNG, the capacity and capability of responsible officials, the failure of officials to hand down any decisions on refugee status since offshore processing recommenced on Manus Island, the failure to implement and communicate timeframes to asylum seekers, the absence of legal assistance and specific procedures for particularly vulnerable groups. We share these concerns.

[45] UN Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', above n 26, [15].
[46] Ibid [16].
[47] Ibid.
[48] Amnesty International, above n 5; 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5.
[49] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, 1.

47. Given the diversity of legal systems, the Refugee Convention itself does not prescribe how RSD should be conducted.[50] However, States (including Australia) have recommended that certain minimum standards be met, as set out in Conclusions of the Executive Committee of UNHCR.[51] In addition, UNHCR has issued Procedural Standards for RSD conducted by UNHCR,[52] the Conclusions of experts on the Global Consultations hosted by UNHCR,[53] and guidance on building quality asylum systems.[54] Finally, under international human rights law, the right to an effective remedy requires States to provide certain procedural safeguards to ensure that they do not expose individuals to *refoulement*.[55] These standards are discussed in the paragraphs below.

48. Since, in the current context, the RSD procedures in PNG are intended to replace Australian RSD procedures, they should be assessed in that light. This submission therefore examines the quality of RSD processes beyond minimum standards. Australia has a sophisticated RSD system in place, including independent merits and judicial review, and asylum seekers should not be exposed to a less robust or fair system because they are transferred to another State. It is also useful to consider comparative international practice, particularly the minimum standards mandated for European Union countries.[56]

4.1.1 Principles

49. As UNHCR has stated:

> Fair and efficient procedures are an essential element in the full and inclusive application of the Convention. They enable a State to identify those who should

[50] United Nations High Commissioner for Refugees, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (December 2011) [189–191].
[51] See, eg, Executive Committee of the United Nations High Commissioner for Refugees, 'Determination of Refugee Status' (EXCOM Conclusions No. 8 (XXVIII), 12 October 1977); Executive Committee of the United Nations High Commissioner for Refugees, 'Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection' (EXCOM Conclusions No. 103 (LVI), 7 October 2005); Executive Committee of the United Nations High Commissioner for Refugees, 'Conclusion on Local Integration' (EXCOM Conclusions No. 104 (LVI), 7 October 2005); Executive Committee of the United Nations High Commissioner for Refugees, 'Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR' (EXCOM Conclusions No. 110 (LXI), 12 October 2010).
[52] United Nations High Commissioner for Refugees, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate' (September 2005) <http://www.refworld.org/pdfid/42d66dd84.pdf>.
[53] 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)' (EC/GC/01/12, 31 May 2001) [5] <http://www.refworld.org/docid/3b36f2fca.html>.
[54] United Nations High Commissioner for Refugees, 'Building In Quality: A Manual on Building a High Quality Asylum System' (September 2011) <http://www.refworld.org/docid/4e85b36d2.html>.
[55] For the content of such safeguards, see further Parliamentary Joint Committee on Human Rights, 'Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 9 – 12 December 2013; Legislative Instruments Received 23 November 2013 – 31 January 2014' (Second Report of the 44th Parliament, February 2014) [1.89]–[1.199].
[56] 'Directive of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)' (2013/32/EU, 29 June 2013) <http://www.refworld.org/topic,50ffbce4c9,50ffbce4117,51d29b224,0,,,.html>.

benefit from international protection under the Convention, and those who should not.[57]

50. Fair procedures should be based on the following principles of procedural fairness:

- The right to be informed about the procedure;[58]
- The right to a reasonable opportunity to prepare your case;[59]
- The right to be heard;
- The right to an unbiased decision-maker;
- The right to know the case against you, answer it, and for your answer to be considered a decision is made;
- The right to have the decision made by the person who heard the evidence.[60]

51. Other core elements that are of special relevance to asylum seekers include:

- Officials should have clear instructions on handling claims, be required to observe the principle of *non-refoulement* (discussed below) and refer cases to a higher authority;[61]
- The primary decision should be made by a clearly identified and (wherever possible) single central authority;[62]
- Asylum seekers should have access to UNHCR representatives;[63]
- Asylum seekers should have access to interpreters;[64]
- Asylum seekers should have access to advice and assistance from organizations providing advice or counselling;[65]
- There should be procedures to identify and assist vulnerable asylum seekers;[66]

[57] 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)', above n 53, [5]. Ibid.
[58] The applicant 'should receive the necessary guidance as to the procedure to be followed': Executive Committee of the United Nations High Commissioner for Refugees, 'Determination of Refugee Status', above n 51.
[59] Ibid.
[60] United Nations High Commissioner for Refugees, 'Building In Quality', above n 54, 12.
[61] Executive Committee of the United Nations High Commissioner for Refugees, 'Determination of Refugee Status', above n 51.
[62] Ibid.
[63] See, eg, ibid; Executive Committee of the United Nations High Commissioner for Refugees, 'Detention of Refugees and Asylum-Seekers' (EXCOM Conclusions No. 44 (XXXVII), 13 October 1986); Executive Committee of the United Nations High Commissioner for Refugees, 'Military or Armed Attacks on Refugee Camps and Settlements' (EXCOM Conclusions No. 48 (XXXVIII), 12 October 1987); Executive Committee of the United Nations High Commissioner for Refugees, 'Internally Displaced Persons' (EXCOM Conclusions No. 75 (XLV), 7 October 1994); Executive Committee of the United Nations High Commissioner for Refugees, 'Safeguarding Asylum' (EXCOM Conclusions No. 82 (XLVIII), 17 October 1997).
[64] Executive Committee of the United Nations High Commissioner for Refugees, 'Determination of Refugee Status', above n 51. See also *Migration Act 1958* (Cth) s 366C; 'Directive of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)', above n 56, [25].
[65] 'Directive of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)', above n 56, [25].

- Processing should take place on a non-discriminatory basis that is fair and transparent;[67]
- Processing should be conducted 'in the most timely and efficient manner possible';[68]
- RSD decision-makers should be appropriately qualified, trained and supervised;[69]
- Asylum seekers should be individually interviewed;[70]
- Recognised refugees should be informed of their status and given documentation of that fact;[71]
- There should be an opportunity for independent review;[72]
- While awaiting an initial decision or an appeal, the asylum seeker should be allowed to remain in the territory;[73] and
- There should be consistency in the treatment of applications.[74]

4.1.2 Non-refoulement and the right to an effective remedy

52. Australia has obligations under the Refugee Convention, CAT, and the ICCPR not to return people to countries where they face a risk of persecution or other forms of serious harm, including arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. These obligations require Australia not to send a person (a) directly to a country where they are at risk of such harm, or (b) indirectly, by sending them to a third country that might then send them to such a place (known as 'chain *refoulement*). At a minimum, this means that any third country must have adequate RSD procedures in place to ensure that people with a protection need are accurately identified.[75]

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[66] Executive Committee of the High Commissioner's Programme, 'Conclusion on Reception of Asylum-Seekers in the Context of Individual Asylum Systems' (EXCOM Conclusions No. 93 (LIII) - 2002, 8 October 2002); United Nations High Commissioner for Refugees, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', above n 52, 1–2; United Nations High Commissioner for Refugees, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 50, [206]–[219]; 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)', above n 53, 13.

[67] United Nations High Commissioner for Refugees, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', above n 52, 1–2.

[68] Ibid.

[69] Ibid; United Nations High Commissioner for Refugees, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 50, para 190; 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)', above n 53, 42. See also 'Directive of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)', above n 56, para 16.

[70] United Nations High Commissioner for Refugees, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', above n 52, 1–2.

[71] Executive Committee of the United Nations High Commissioner for Refugees, 'Determination of Refugee Status', above n 51.

[72] Ibid; United Nations High Commissioner for Refugees, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', above n 52, 1–2.

[73] Executive Committee of the United Nations High Commissioner for Refugees, 'Determination of Refugee Status', above n 51.

[74] United Nations High Commissioner for Refugees, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', above n 52, 1–2. Ibid.

[75] For a recent example, see *AC v Spain,* European Court of Human Rights, app no. 6528/11 (22 April 2014). In this case, it was held that Spain had violated the right to an effective remedy in circumstances where claims for international protection and for judicial review did not prevent removal to Morocco, and the proceedings to stay deportation were subject to expedited procedures.

53. As discussed above (see 3.2.5), the right to an effective remedy under article 2 of the ICCPR means that procedural and substantive safeguards are required to ensure that the principle of *non-refoulement* is respected. Principally, the remedy must involve an independent, effective, impartial and substantive review of a removal or expulsion decision. The review must be in the form of a guarantee and have automatic suspensive effect, and must be accompanied by procedural safeguards (such as sufficient time to appeal, and access to legal representation and interpreters). Priority should be placed on judicial remedies rather than decisions made solely by political and subordinate administrative organs.[76]

4.1.3 Lack of a legal framework

54. The most fundamental problem with the current RSD process in PNG is that there is no 'procedural or substantive guidance' as to how decision-makers should determine whether a person is a refugee.[77] The criteria for determining refugee status have not yet been codified in legislation, and at the time of UNHCR's visit to Manus Island in October 2013, not even procedural guidelines had been finalized.

55. The absence of a legal framework makes it very difficult to assess the quality and accuracy of RSD, and to challenge any determinations wrongfully made. It also breaches the requirements of procedural fairness, including the minimum standard that an asylum seeker should have 'clear guidance' on the procedure[78] An asylum seeker is entitled to know what the RSD process involves prior to taking part in it, so they have a reasonable opportunity to prepare.

56. The absence of a legal framework in PNG stands in stark contrast to the position in industrialized countries, including Australia, where there is extensive legislation and jurisprudence governing RSD.[79]

4.1.4 Right to be informed about the process

57. The uncertainty about the RSD process in PNG has resulted in wholly inadequate communication to asylum seekers. Indeed, this was the most serious and frequent complaint recorded by Amnesty International[80] and appears to have been a possible trigger for the February 2014 incidents. As UNHCR stated:

> It is an essential procedural safeguard that asylum-seekers should be informed of the RSD processes at the earliest possible stage and be kept well-informed throughout the procedure. In particular, asylum-seekers have the right to be informed orally and in writing, in a language which they understand, of the processes and procedures to be followed, of their rights and obligations during the procedure and to consult in an effective manner with a legal adviser. The communication of these rights is essential

[76] See the discussion generally in Parliamentary Joint Committee on Human Rights, 'Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 9 – 12 December 2013', above n 55, [1.189]–[1.194].
[77] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [20].
[78] Executive Committee of the United Nations High Commissioner for Refugees, 'Determination of Refugee Status', above n 51.
[79] See, eg, Refugee Review Tribunal, *Guide to Refugee Law* (2010) <http://www.mrt-rrt.gov.au/Conduct-of-reviews/Guide-to-Refugee-Law/Guide-to-Refugee-Law-in-Australia/default.aspx>.
[80] Amnesty International, above n 5, 8.

in order for asylum-seekers to be able to exercise their rights, as rights are rendered ineffective if an asylum-seeker is unable to act on them due to a failure of being informed of what those rights are.[81]

58. UNHCR reported that in October 2013, there were not even basic information sheets available to asylum seekers about the RSD process.[82]

4.1.5 Reasonable opportunity to prepare case

59. The absence of information means that asylum seekers do not have a reasonable opportunity to prepare their case. This is compounded on Manus Island by the lack of access to legal advice and representation or other facilities to assist with the process. Although Australia has a contract with an Australian firm of immigration lawyers and migration agents (Playfair) to assist asylum seekers on Manus Island to compile evidence to support their protection claim, the contract does not allow them to provide for legal advice or advocacy.[83] The only access to legal counsel would be if those on Manus Island could afford to hire private lawyers qualified to practise in PNG.[84] In reality, it is very unlikely that this will occur – not only because of a lack of resources, but also because there is very limited refugee law experience among legal practitioners in PNG (and limited capacity in any case) in PNG.[85]

60. Comparative State practice indicates that access to legal advice is a key part of fair RSD procedures.[86] Given the complexity of refugee law, access to legal advice is a core part of a quality RSD system.

61. Although access to legal advice in Australia itself is increasingly restricted, there are at least still some organizations providing free legal advice to refugees. In contrast, the pool of qualified PNG lawyers in this specialist area of practice is extremely small, and unlike Australia, there is no tradition of pro bono legal services there.

62. Further, it appears that PNG cannot provide interpreters for some of the smaller ethno-linguistic groups on Manus Island, making it impossible for these asylum seekers to participate effectively in any RSD process.[87]

4.1.6 Capacity and capability

63. RSD is a complex fact-finding exercise, which requires training, expertise and judgement. Decision-makers need to be able to identify and assess relevant country information, be familiar with the use of interpreters, and be able to reason logically and apply the appropriate procedural and substantive principles.

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[81] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [48].
[82] Ibid [46].
[83] Amnesty International, above n 5, 63.
[84] Ibid 64.
[85] Ibid.
[86] 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)', above n 45, 12; 'Directive of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)', above n 47.
[87] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [97].

64. This exercise is even more difficult given the circumstances in PNG, where asylum seekers are not assisted by legal representatives, may not have access to interpreters, and are likely to have complex health needs that impact upon their ability to participate fully in the RSD process. This is not helped by the fact that the PNG government is essentially building an RSD system from scratch and in haste.

65. It is therefore not surprising that UNHCR has significant concerns about the capacity and capability of RSD officers in PNG,[88] particularly given the 'very complex' nature of the cases and the withdrawal of mentoring or oversight by experienced decision-makers.[89] At the time of its visit to Manus Island in October 2013, there were only two or three RSD officers available to conduct assessments. This is wholly inadequate when there are over 1,000 asylum seekers waiting to have their protection claims assessed.

66. We echo UNHCR's grave doubts about the capacity of the PNG government to conduct RSD in a fair, efficient or effective manner. The fact that to date, no RSD decision has been handed down, underlines this point.[90]

67. While faster processing is of course desirable, we are concerned that asylum claims may not be examined sufficiently rigorously if decisions are to be handed down within a month, as was recently suggested by the Australian Prime Minister.[91] We are also concerned at his suggestion that most of the asylum seekers on Manus Island are unlikely to be determined to be refugees,[92] since this may bias decision-makers and result in refugees being sent back to persecution and significant harms, in violation of international law.[93]

4.1.7 Vulnerable groups

68. Another concern is the absence of specific support for vulnerable persons, including survivors of torture and trauma,[94] children, illiterate asylum seekers and those with learning difficulties and disabilities.[95] Further, deteriorating mental health problems also need to be addressed through specific procedures.[96]

[88] Ibid [31].
[89] Ibid [33].
[90] Ibid 2.
[91] 'Asylum Seekers May Be Resettled in Papua New Guinea within Three Months: Tony Abbott' *ABC Premium News* (Sydney, Australia), 21 March 2014 <http://search.proquest.com/docview/1508860814?accountid=12763#>.
[92] Ibid.
[93] Australian Associated Press, 'Tony Abbott: Most Manus Asylum Seekers Won't Be Declared Genuine' *The Guardian*, 22 March 2014 <http://www.theguardian.com/world/2014/mar/22/tony-abbott-most-manus-island-detainees-wont-be-found-to-be-genuine>.
[94] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, Rec C.
[95] Amnesty International, above n 5, 65.
[96] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [108].

69. In contrast, in Australia the Refugee Review Tribunal has guidelines on dealing with vulnerable asylum seekers, and the need to adopt special procedures in relation to them.[97] For example, decision-makers should obtain expert medical advice before examining those with mental health problems including survivors of torture and trauma, lighten the burden of proof, and make greater efforts to obtain external evidence.[98] Illiterate asylum seekers should be given access to a person who can explain the process and any relevant documents to them.

70. Although we understand that children are not currently being held on Manus Island, we note that there are plans to send them there once a new facility has been completed.[99] We agree with UNHCR that children should not be processed on Manus Island because it is an unsuitable environment for them.[100] However, if they are to be processed there, special procedures must be applied in order to comply with Australia's obligations under the Convention on the Rights of the Child.[101] These procedures should include, for example, appointment of an adult to represent the child's best interests (including in all interviews), access to legal advice, priority in processing, and special consideration of their particular circumstances as children.[102]

4.1.8 Complementary protection and statelessness

71. We also share UNHCR's concern that there is currently no procedure in PNG to address complementary protection claims, notwithstanding assurances to the contrary in the Memorandum of Understanding between Australia and PNG.[103] Complementary protection reflects States' obligations under CAT and the ICCPR to ensure that asylum seekers are not sent to places where they face a real risk of being arbitrarily deprived of life, or exposed to torture or other cruel, inhuman or degrading treatment or punishment. Australian law mandates that if asylum seekers are found not to be Convention refugees, their claims are assessed against the complementary protection criteria.[104] If such an assessment does not occur in PNG, then both Australia and PNG risk violating international law.

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[97] Refugee Review Tribunal, *Guidance on Vulnerable Persons* <http://www.mrt-rrt.gov.au/Files/HTML/P-C-GU-GuidanceVulnerablePersons.html>. See also 'Directive of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)', above n 56, para 29.

[98] United Nations High Commissioner for Refugees, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', above n 50, [206]–[212].

[99] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [90]–[91].

[100] Ibid 21, Recommendation Q.

[101] Convention on the Rights of the Child (opened for signature 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990).

[102] UN Committee on the Rights of the Child (CRC), 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' UN Doc CRC/GC/2005/6, 1 September 2005 [68]–[72].

[103] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, Rec G.

[104] *Migration Act 1958* (Cth) s 36(2A). There is, however, a pending Bill proposing to repeal this legislation: Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.

72. Further, there are no arrangements in place to fulfil Australia's obligations in respect of stateless persons,[105] under the 1954 Convention on the Status of Stateless Persons[106] and the 1961 Convention on the Reduction of Statelessness.[107] These obligations include: protection from expulsion other than on grounds of national security or public order; the right of freedom of movement; the right to identity papers and travel documents; obligations to facilitate naturalization and the grant of nationality; and restrictions on deprivation of nationality. Although PNG, unlike Australia, is not a party to the statelessness treaties, Australia remains responsible under international law for any breaches that may be occasioned as a result of its transfer of asylum seekers to PNG.

4.2 Assessing fairness of procedures

73. Difficulties in assessing the fairness of RSD procedures in PNG are compounded by lack of access to asylum seekers on Manus Island and the limited public information available. Limited access – and therefore accountability – remains a significant concern of offshore processing.

74. However, one proxy for determining the fairness of procedures is to compare refugee recognition rates for particular ethnic/national groups on Manus Island to similar cohorts of asylum seekers who have been processed in Australia. The following table suggests that it is very likely that the majority of asylum seekers on Manus Island are Convention refugees and not 'economic migrants', as some politicans have asserted.

[105] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, Rec I.
[106] Convention Relating to the Status of Stateless Persons (opened for signature 28 September 1954, 360 UNTS 117, entered into force 6 June 1960).
[107] Convention on the Reduction of Statelessness (opened for signature on 4 December 1954, 360 UNTS 117, entered into force 13 December 1975).

Country of origin	Number on Manus Island, 26 Oct 2013	Finally determined visa grant rates – Australia, 2012-2013
Iran	503	91.0%
Afghanistan	103	90.8%
Iraq	84	91.1%
Pakistan	60	80.4%
Stateless	79	91.8%
Bangladesh	53	42.7%
Lebanon	42	19.9%
Sri Lanka	29	63.9%
Nepal	15	12.5%
Myanmar	16	89.5%
Syria	4	97.4%
Egypt	2	78.7%

Source: Finally determined grant rates by top 20 countries of citizenship (primary and review processes completed, 2012-2013, non-illegal maritime arrival), Department of Immigration and Citizenship, Asylum Statistics Australia, June 2013. The table excludes asylum-seekers on Manus Island from countries which were not in the top 20 countries of citizenship, including Sudan (83), Somalia (14), Vietnam (3), Albania, Algeria and Kuwait (one each).

5 Resettlement

Summary: Resettlement of Convention refugees in PNG is unlikely to result in durable solutions, given past experiences. There are also risks of other breaches of international law involved in resettlement on PNG.

5.1 Durable solutions

75. While the focus of this submission has been the conditions of detention and the inadequacy of RSD processes in PNG, a longer-term concern of processing asylum seekers in PNG relates to resettlement. Resettlement in PNG is unlikely to offer a durable solution for those recognized as refugees.

76. Unlike Australia, PNG is not a country of immigration. It does not have a history of accepting refugees or migrants, and it does not have the services or support that are necessary to enable refugees to integrate into the community. The Australian Government has made few public statements about the plans for support once the refugees are resettled.

77. Reflecting on nearly 30 years of experience working with Melanesian and non-Melanesian refugees, UNHCR has stated that 'sustainable integration of non-Melanesian refugees in the socio-economic and cultural life of PNG will raise formidable challenges', and 'UNHCR has been obliged to remove 'non-Melanesian' refugees for resettlement to third countries, including Australia, precisely because of severe limitations of finding safe and effective durable solutions in PNG itself.'[108]

78. In particular, we echo UNHCR's concerns that:

[108] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [122].

- Most asylum seekers currently in PNG are Muslims, while the vast majority of PNG citizens are Christians. This is likely to cause difficulties in integration and the ability of refugees to exercise freedom of religion.[109]
- Employment opportunities are likely to be very limited, given the kinship and affiliation systems in place in PNG; challenging economic conditions; and a lack of support for the recognition of overseas qualifications. [110]
- There is no clarity as to the rights of family reunification for recognized refugees.[111]

5.2 Groups potentially subject to persecution in PNG

79. There also remains the risk that some asylum seekers are at risk of persecution in PNG itself. For example, PNG's continued criminalization of homosexuality places lesbian, gay, bisexual, transgender or intersex individuals (LGBTI) at risk.[112] Amnesty International reported that fear of persecution was inhibiting such people from making claims based on sexuality, and these fears were 'even more pronounced because detention centre staff have warned them that any consensual sexual conduct between detainees will be reported to Papua New Guinea police for prosecution'.[113]

80. While this group of asylum seekers raises obvious protection concerns, there may be other groups at risk of persecution in PNG. For example, PNG has very high rates of domestic violence, and Australia has accepted refugee claims from PNG women who have suffered such abuse. Transferring asylum seekers to PNG without assessing such risks means that Australia may directly breach its *non-refoulement* obligations.

6 Offshore processing

Summary: Australia's policy of offshore processing creates real risks of multiple violations of international obligations, including *non-refoulement* obligations, obligations not to penalise refugees for illegal entry, arbitrary deprivation of liberty and unjustified restrictions on freedom of movement, and cruel inhuman or degrading treatment.

81. Finally, we urge this Inquiry to recognize that Australia's policy of offshore processing creates risks of multiple violations of Australia's international legal obligations. Some of these are summarized briefly below.

6.1 *Non-refoulement*

82. As already discussed, Australia, as a party to the Refugee Convention, the ICCPR and CAT is prohibited from sending people to countries – including third countries – where they are at risk of persecution, death, torture, or other cruel, inhuman or degrading treatment or punishment.

83. The offshore processing policy creates multiple risks that these obligations may be breached, including as a result of:

[109] Ibid [124].
[110] Ibid.
[111] Ibid [125].
[112] Ibid [123].
[113] Amnesty International, above n 5, 7.

- Transferring asylum seekers at risk of persecution or other forms of significant harm in the offshore processing country itself, such as LGBTI individuals (discussed above);
- Inadequate RSD procedures in offshore processing countries, meaning that Convention refugees and those in need of complementary protection may not be properly identified and protected (discussed above);
- Inappropriately promoting so-called 'voluntary returns', with the result of pressuring refugees to return to persecution;[114]
- Transferring asylum seekers to conditions that are themselves cruel, inhuman or degrading.

6.2 Penalization of refugees arriving irregularly

84. Article 31 of the Refugee Convention requires States not to impose penalties on refugees who arrive 'without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'. The policy of offshore processing violates this obligation as it targets those who arrive irregularly by boat.

6.3 Arbitrary deprivation of liberty

85. The right to liberty is enshrined in article 9 of the ICCPR and (subject to exceptions) in article 42(1) of the PNG Constitution. Regrettably, PNG recently amended the Constitution to exempt from this constitutional protection those detained on Manus Island.[115] Nevertheless, PNG (and Australia) remain responsible under international law for arbitrary deprivations of liberty.

86. The UN Human Rights Committee has observed that while detention of asylum seekers is not arbitrary *per se*,

> the detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review. Children may be deprived of liberty only as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention. Decisions regarding the detention of adult migrants must

[114] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [117]–[119]; Amnesty International, above n 5, 66.
[115] ABC Radio Australia, 'PNG Amends Constitution to Protect Manus Detention Centre', *Pacific Beat*, 3 April 2014 <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/png-amends-constitution-to-protect-manus-detention-centre/1290320>.

> also take into account the effect of the detention on their mental health. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual does not justify indefinite detention.[116]

87. The current arrangements on Manus Island constitute arbitrary detention that is inconsistent with international law.[117]

6.4 Freedom of movement

88. The right to freedom of movement is enshrined in article 12 of the ICCPR, article 26 of the Refugee Convention (for those lawfully in the territory) and in section 52 of the PNG Constitution (for citizens only).

89. In its 2013 report, UNHCR concluded that there is no genuine freedom of movement for asylum seekers detained on Manus Island.[118] Even movement within the compound in which they are held is highly regulated.[119]

6.5 Conditions of detention

90. As already noted, conditions of detention themselves may violate the prohibition on torture or other cruel, inhuman or degrading treatment contained in article 7 of the ICCPR. Further, both UNHCR and Amnesty's reports suggest that multiple other violations may have occurred as a result of detention conditions, including:

- Right to security (for example, the absence of policies and procedures on bullying, harassment or sexual assault);[120]
- Freedom of religion (for example, the lack of Muslim religious leaders, and culturally inappropriate facilities);[121]
- Right to family life (for example, the inability to contact family members, and the prospect of separation from their families in the long term);[122]
- Rights of those with disabilities[123] and children[124] (for example, failures to provide assistance to those with disabilities and to ensure adequate age assessment to prevent detention of children).

[116] UN Human Rights Committee, 'Draft General Comment No. 35, Article 9: Liberty and Security of Person', above n 38, [18].
[117] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [74], [80].
[118] Ibid [73].
[119] Amnesty International, above n 5, 48.
[120] Ibid 48, 50.
[121] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [95]–[96]; Amnesty International, above n 5, 47.
[122] 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea', above n 5, [100].
[123] Convention on the Rights of Persons with Disabilities (opened for signature 30 March 2007, 2515 UNTS 3, entered into force 3 May 2008).
[124] Convention on the Rights of the Child (opened for signature 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990).

7 Conclusion

91. This submission has outlined the numerous problems involved with offshore processing, and the specific ways in which it contributed to the incidents on Manus Island. We urge the Inquiry to consider this broader underlying context when examining the causes of those incidents.

92. We thank the Senate Legal and Constitutional Affairs References Committee for the opportunity to make this submission, and would be happy to provide further assistance upon request.

Manus Island

In August 2012, the Gillard Labor Government passed legislation reinstating offshore processing. On 21 November 2012, the first group of asylum seekers was transferred to Manus Island. UNHCR visited the processing centre on Manus Island in January, June and October 2013, and Amnesty International visited the processing centre in November 2013. Their findings are outlined below.

Physical conditions

The Manus Island processing centre is located at a PNG defence force base, about 40 minutes' drive from the main town of Lorengau.[1] The centre is divided into 'compounds' which house asylum seekers, each compound being patrolled by security guards.[2] When entering and leaving each compound, asylum seekers must sign in and out, and must always be accompanied by a guard.[3] During UNHCR's visit in January, the processing centre was described as 'temporary', having been established 'pending more permanent accommodation'.[4] However, it was later made known to UNHCR, during its visit in October, that a new processing centre, which was under construction at a site near Lorengau, was not intended to house all asylum seekers transferred to Manus Island, but only families and children, and perhaps also recognised refugees.[5]

In January, UNHCR found that asylum seekers were being held in 'harsh' conditions on Manus Island, where the 'hot and humid weather made the temporary accommodation very uncomfortable'.[6] Single adult males were held in 'four metre by four metre canvas tents', each housing five men.[7] Some of the men were living in conditions described by UNHCR as 'deplorable'.[8] Families were held in '"dongas", similar to shipping containers, which are around three metres by three metres'.[9] Parents expressed concern that 'their children could hear threats from some single adult males of self-harm, angry voices and discussions, and the general noise from the neighbouring compound' (which, at the time of UNHCR's visit, was housing a group of single adult males who were protesting).[10]

Although some improvements were observed by UNHCR during its second visit in June, the physical conditions of the processing centre remained 'harsh' and 'essentially unchanged' since its visit in January.[11] By October, asylum seekers were no longer being housed in tents, but rather 'hard-walled structures'.[12] However, by this time, the number of asylum seekers had swelled to 1093 (from 302 in June),[13] following the announcement of the Regional Resettlement Arrangement between Australia and PNG on 19 July 2013. Amnesty International reported that in November 2013, the processing centre housed just over 1,100 asylum seekers.[14] They were allocated across the three main compounds, known as Delta, Foxtrot and Oscar.[15] A new compound, known as Mike, was being constructed and close to completion at the time of Amnesty International's visit.[16]

Asylum seekers expressed a number of concerns about their living conditions, including overcrowding, lack of privacy, and extreme heat and humidity.[17] Amnesty International expressed particular concern about the 'P Dorm' in Foxtrot Compound, which 'stood out as the worst accommodation in the facility':[18]

> ‘P Dorm is a hangar-shaped World War II-era building approximately 40 metres long and four to five metres wide, with a low, curved corrugated metal roof. It sleeps 112 men on 56 sets of bunk beds arranged with no more than 20 centimetres between each. Two large free-standing fans were in use when we visited at the front of the room, but there was no air flow to the back of the building. The smell is overwhelmingly bad and the heat is stifling. There are no windows. Asylum seekers reported finding snakes in the room and flooding when it rained.’[19]

The discomfort caused by crowded conditions is exacerbated by the tropical climate on Manus Island, where the temperature lies between 30 and 40 degrees Celsius, humidity is high, and the weather can vary from ‘intense sunshine’ to ‘heavy downpours’.[20] According to Amnesty International, there is little protection from the elements:

> ‘Asylum seekers reported spending between one and five hours a day queuing for meals, for the canteen, for toilets and showers, and while waiting to be collected at the gates for interviews and medical appointments. There is almost no shade to protect people from the sun, heat, or rain, particularly in Oscar Compound …
>
> When it rains, the camp smells strongly of sewage, particularly in Foxtrot Compound and near the entrance to the detention centre. Some detainees expressed concern at not having shoes or umbrellas, particularly when the weather is bad and it rains.’[21]

Asylum seekers also expressed distress about being given insufficient access to phone and internet facilities to contact their family overseas.[22]

Health care

The adequacy of health care facilities on Manus Island is also a major concern. In January 2013, UNHCR reported:

> ‘A large number of asylum-seekers who spoke to UNHCR expressed concern about the amount of time they had to wait for an appointment, and other disputes regarding appropriate treatment. Due to restrictions on freedom of movement, asylum-seekers need to be transported from their compound to the clinic by G4S, and some asylum-seekers raised concerns that they are unable to directly approach the clinic when health issues arise. Some complained that “to get a Panadol for a headache” you had to make a request and wait up to three days (by which time the headache was gone).’[23]

Little seems to have improved. In October 2013, asylum seekers expressed concern to UNHCR about:

> ‘a) their deteriorating physical as well as mental health;
> b) the limited medical services available;
> c) respiratory concerns that were exacerbated due to the hot and humid conditions;
> d) the time it took to access medical treatment; and
> e) the limited medication they were issued with.’[24]

In November 2013, Amnesty International reported that it was ‘concerned that the medical facility within the camp is unable to cope with the growing demand for health and mental health services’.[25] Asylum seekers expressed a number of concerns:

> ‘A number of detainees raised concerns that sometimes it takes between three and 10 days to receive a medical appointment after submitting a request [for an appointment]. Some felt that they needed to make several requests in order to be taken seriously and many complained that water and paracetamol was common treatment. The lack of ability

> to self-administer paracetamol for headaches or antiseptic cream for minor cuts means asylum seekers … often have to seek many appointments for even basic medical care. One doctor commented on the absurdity of requiring people to return to medical appointments several times to receive medication.'[26]

Medical staff on Manus Island also expressed concern about the adequacy of health care at the Manus Island processing centre. According to Amnesty International, medical staff 'expressed frustration at the lack of response from Australian authorities to basic requests which would improve health and sanitation within the camp'.[27] They also 'expressed frustration that when certain conditions could not be treated in the centre, requests for transfer had been ignored'.[28] Moreover, medical personnel were 'clearly frustrated that people are deprived of activities or mental stimulation, which is escalating mental health problems within the detention centre'.[29]

Detention

Harsh physical conditions aside, the arbitrary nature of the detention of asylum seekers on Manus Island is disquieting. According to UNHCR:

> 'The current PNG policy and practice of detaining all asylum-seekers at the closed [processing centre], on a mandatory and open-ended basis without an assessment as to the necessity and proportionality of the purpose of such detention in the individual case, and without being brought promptly before a judicial or other independent authority for review of that decision amounts, in UNHCR's assessment, to arbitrary detention that is inconsistent with international law.'[30]

Amnesty International similarly reported:

> 'Asylum seekers are detained in the absence of any individualised assessment of the need for detention, with no definite date for their release, apparently without any framework in Papua New Guinea for their detention, and no clear means to seek review of the lawfulness of their detention. The result is arbitrary detention, prohibited by customary international law and by treaties to which both Australia and Papua New Guinea are party.'[31]

RSD

From the perspective of asylum seekers on Manus Island, there seems to be no end in sight to their plight. Although the transfer of asylum seekers to Manus Island commenced in October 2012, the processing of their refugee claims had not yet started at the time of UNHCR's visit in January 2013, and there was moreover no indication of when such processing would start.[32] This was causing significant distress among asylum seekers:

> 'Asylum-seekers expressed varying degrees of confusion to UNHCR over the processing arrangements that would apply to them in PNG. Most advised that the information they received upon arrival about how and when the process would begin was limited and confusing, and many expressed frustration that no one at the Centre would provide them with adequate answers.'[33]

In June 2013, UNHCR welcomed the commencement of RSD processing on Manus Island.[34] However, in June as well as October, asylum seekers continued to express confusion and anxiety about the processing arrangements that would apply to them.[35] Such concerns were also reported by asylum seekers to Amnesty International:

> ‘By far the most frequent complaint, and the one detainees almost universally regarded as the most serious, was that they have been left in uncertainty – about the timetable for Refugee Status Determination hearings and decisions on those hearings, about how long they would remain in detention, about where they would live and work in Papua New Guinea if they were accepted as refugees, about the culture and other aspects of life in Papua New Guinea, about their fate in every respect. Virtually all have family members – parents, spouses or partners, and/or children – in the countries from which they fled, and many expressed anguish at the prospect of being detained indefinitely and remaining powerless to safeguard their families’ well-being.’[36]

Contributing to this uncertainty is the questionable capacity of PNG officials to undertake fair and timely refugee status determination on Manus Island. In October 2013, UNHCR expressed concern that ‘there is no clear and adequate legal or regulatory framework for conducting RSD in PNG’.[37] Moreover, UNHCR reported:

> ‘UNHCR has serious concerns about the RSD capacity and capability currently available to the Government of PNG to process, in an efficient and timely manner, the asylum-seekers who have arrived, and will continue to arrive, at the [processing centre]. In this regard, UNHCR notes with concern that as of 28 October 2013, of the 1,093 asylum-seekers who were at the [processing centre] during UNHCR’s visit, only about 160 had been able to lodge applications for asylum and only 55 had received RSD interviews.’[38]

Children

During UNHCR’s visit in January, there were 34 children on Manus Island.[39] UNHCR expressed particular concern about their welfare:

> ‘Asylum-seekers and service providers expressed concerns to UNHCR that the on-going restrictions on freedom of movement may have a long-term impact on the psychosocial health and development of the children. Some service providers report that children are showing signs of the trauma of both their boat journey to Australia and the on-going detention on Manus Island, as well as the worries and stresses being expressed by their parents “rubbing off” on them and causing additional anxiety in the children.’[40]

By October, UNHCR found that children and families had been transferred back to Australia, although there were plans to move them back to Manus Island in 2014, once construction of the new processing centre had been completed.[41] UNHCR expressed its ‘firm view that children and families should not be transferred to PNG’.[42]

Amnesty International reported that the Manus Island processing centre ‘housed at least three children under the age of 18 until just before our visit in mid-November 2013, reportedly as the result of an administrative error’.[43] They were kept in a separate area of the processing centre.[44] Two were sent to Christmas Island on 9 November 2013, and the third was transferred to the general population when he was determined by the Department of Immigration to have turned 18 (although he said that he would not be 18 for another year).[45] Amnesty International also met with three other asylum seekers who had been determined by the Department of Immigration to be over 18, although they said that they were between 15 and 17 years of age.[46] According to Amnesty International:

> ‘The treatment of their cases raises serious concerns about the age assessment procedures employed by Australia’s Department of Immigration and Border Protection (DIBP). Particularly since early September, with the introduction of a new rule that asylum seekers must be transferred to Papua New Guinea within 48 hours of arrival on Christmas Island, initial assessments are made within a short time frame and thus appear to rely heavily on observations of physical appearance.’[47]

Amnesty International also expressed concern that children were not being given the benefit of the doubt by the Department of Immigration, contrary to international standards.[48] Poor age assessments are problematic because they may have the effect of depriving children of the special care and treatment which is required to be accorded to them under international law.

Return-oriented environment

Asylum seekers on Manus Island are given the option of returning to their country of origin. Although UNHCR expressed its support for assisted voluntary returns, it also questioned whether asylum seekers' decisions to return to their home country could be characterised as truly 'voluntary', given the 'pervasive climate [on Manus Island] which places an emphasis on promoting return':[49]

> 'When responding to asylum-seekers concerns and complaints, some asylum-seekers reported that they are told that they can return if they are dissatisfied. In particular, one asylum-seeker shared with UNHCR a letter received from a service provider agency advising that: *'if you are not pleased with the current processing arrangement, we can put you in touch with IOM [International Organization for Migration] who may assist you with return to your country of origin'*.'[50]

One asylum seeker on Manus Island reportedly told Amnesty International:

> 'Every day, I hear about returning 70 times a day for the last four months. On top of that, every gathering we get told to return or you will stay in PNG'.[51]

Such pressure to return may result in *refoulement*. According to UNHCR:

> '[S]ome asylum-seekers at the [processing centre] who may be *bona fide* refugees, or in need of complementary protection, may contemplate a return to their country of origin as a result of the combined uncertainty around processing in PNG, the prospect of lengthy delays in accessing a permanent solution, the harsh conditions, and the prospect of settling in PNG where there are high levels of insecurity and significant challenges around local integration.'[52]

Durable solutions

Both UNHCR and Amnesty International expressed concern about the obstacles to the successful resettlement of refugees in PNG. According to UNHCR, 'sustainable integration of non-Melanesian refugees in the socio-economic and cultural life of PNG will raise formidable challenges and protection concerns'.[53]

One issue is that homosexuality is criminalised in PNG. According to Amnesty International:

> 'Gay men expressed considerable fear about resettlement in Papua New Guinea, where same-sex sexual conduct is criminalised and police abuse against gay and transgender people is common. Several of the men with whom we spoke were apprehensive about disclosing their sexual orientation during their Refugee Status Determination interviews even when it was a basis for their refugee claim. Their fears were even more pronounced because detention centre staff have warned them that any consensual sexual conduct between detainees will be reported to Papua New Guinea police for prosecution.'[54]

Other issues relate to religion, access to education and employment, and the availability of social support in PNG. According to UNHCR:

> '[T]he vast majority of PNG citizens are Christians, meaning that there is likely to be little community understanding of Islam and few places of worship available to Muslims. UNHCR also notes that currently, non-Melanesian refugees in PNG are unable to access State education and employment. Even if these barriers are overcome, in addition to finding employment, the PNG "wantok" system of kinship and affiliation is not likely to provide any real measure of security for non-Melanesian refugees from outside the region. In PNG society, challenging economic conditions and a lack of support for the recognition of overseas qualifications is expected to make attainment of meaningful employment extremely difficult for refugees in PNG.'[55]

Conclusion

In October 2013, UNHCR reported:

> 'Overall, UNHCR was deeply troubled to observe that the current policies, operational approaches and harsh physical conditions at the [processing centre] do not comply with international standards and in particular:
> a) constitute arbitrary and mandatory detention under international law;
> b) do not provide a fair, efficient and expeditious system for assessing refugee claims;
> c) do not provide safe and humane conditions of treatment in detention; and
> d) do not provide for adequate and timely solutions for refugees'[56]

In November 2013, Amnesty International reported:

> 'The combined effect of the conditions of detention on Manus Island, the open-ended nature of that detention, and the uncertainty about their fates to which detainees are subjected amounts to cruel, inhuman, and degrading treatment or punishment. Moreover, some conditions of detention, particularly the housing of detainees in P Dorm, on their own violate the prohibition on torture and other ill-treatment.'[57]

NAURU

The transfer of asylum seekers to Nauru commenced in September 2012. Amnesty International visited the processing centre on Nauru in November 2012, and UNHCR visited the processing centre in December 2012, March and October 2013. Their findings are examined below.

Physical conditions

The processing centre on Nauru is located in the centre of Nauru on a phosphate plateau, away from the coast, where most of the Nauruan population resides.[58] In late 2012, both Amnesty International and UNHCR reported that asylum seekers were being housed in tents serving as temporary accommodation pending the construction of more permanent facilities on Nauru. UNHCR described the conditions as 'harsh, with little natural shelter from the heat during the day, which is exacerbated by all the challenges arising from residing in a construction zone, including significant noise and dust'.[59] Amnesty International reported the processing centre to be:

> 'totally inappropriate and ill-equipped, with 387 men cramped into 5 rows of leaking tents, suffering from physical and mental ailments – creating a climate of anguish as the repressively hot monsoon season begins'.[60]

In March 2013, UNHCR noted 'a significant improvement to conditions as a result of the construction of the more permanent purpose-built accommodation which was more suitable for the climatic conditions, and which replaced the original tents seen at the time of UNHCR's December 2012 visit'.[61]

However, due to riots which took place on 19 July 2013, substantial damage was caused to the buildings on Nauru. During its visit in October 2013, UNHCR reported that the purpose-built accommodation was 'largely destroyed'.[62] Single adult men were being held in tent compounds, with no fans, little privacy, and insufficient toilet and shower facilities.[63] Families, children and single adult women were being held in vinyl marquees, each housing several families, with individual family areas separated by vinyl partitions.[64] UNHCR reported that these were 'cramped conditions, with very little privacy, in very hot conditions, with some asylum-seekers sleeping on mattresses on the ground'.[65]

According to UNHCR:

> '[T]he conditions at the [processing centre], coupled with the protracted period spent there by some asylum-seekers, raise serious issues about their compatibility with international human rights law, including the prohibition against torture and cruel, inhuman or degrading treatment (article 7, ICCPR), the right to humane conditions in detention (article 10, ICCPR) and the right to family life and privacy (article 17, ICCPR).'[66]

Health care

In December 2012, UNHCR found that there were 'limited facilities in Nauru to manage medical health issues'.[67] Health facilities continue to be limited on Nauru. During UNHCR's visit in October 2013, asylum seekers raised concerns about a number of issues with UNHCR, including:

> 'a) lack of adequate medical facilities, including for heart conditions, dental issues and, in one case, to address a metal plate embedded in one person's leg;

b) hygiene issues – many complained of skin conditions and other infections, including parasites and lice;
c) lack of a gynaecologist for the women;
d) lack of access to x-rays and other medical equipment; and
e) limited access to medication.'[68]

Adequacy of medical facilities aside, it is problematic that the detention environment itself is contributing to mental health problems among asylum seekers. During its visit in November 2012, Amnesty International reported:

> 'Nine men in the camp are confirmed to be on hunger strike, many more claim they are on one. One hunger striker, Omid, has not eaten for over 40 days. He told the [Amnesty International] delegation that he has lost 19 kilograms but that *"my psychological condition is even worse than my physical one"*. Many of the men stated that they felt their only option was starting or returning to a hunger strike, or attempt self-harm or suicide. During the visit one man tried to hang himself from a tent pole. The man who pulled him down told Amnesty International that he had lost hope for any justice from Australia after hearing the news that post-13 August, asylum seekers would be released into the Australian community.'[69]

In October 2013, UNHCR found that:

> 'the morale of asylum-seekers [is] extremely low as a result of uncertainty over and delays in processing and their futures, combined with the harsh conditions within the mandatory detention framework currently prevailing'.[70]

Such observations are supported by views expressed by medical and security staff, who informed UNHCR that:

> 'the sense of injustice [being transferred to Nauru, while other asylum seekers were not], along with the hot and crowded detention conditions, a sense of isolation and abandonment, and a lack of information and clarity about their processing and future prospects, has led to widespread depression'.[71]

Detention

Both Amnesty International and UNHCR have reported that asylum seekers are subject to arbitrary detention on Manus Island, contrary to international law.[72] UNHCR found that:

> 'The current Nauru policy and practice of detaining all asylum-seekers at the closed [processing centre] on a mandatory and open-ended basis, without an individualized assessment as to the necessity, reasonableness and proportionality of the purpose of such detention amounts to arbitrary detention that is inconsistent with international law.'[73]

Amnesty International expressed similar views and further found that:

> 'the combination of no refugee processing, implementation of the "no advantage rule" and harsh detention conditions, amounts to a clear penalty for seeking asylum by boat. This contravenes article 31 of the 1951 UN Refugee Convention.'[74]

RSD

Processing of refugee claims on Manus Island only commenced in March 2013, although asylum seekers had been sent there from September 2012.[75] Although acknowledging that

the legal framework for refugee status determination in Nauru was 'sound',[76] UNHCR expressed concern about delays in processing during its visit in October 2013:

> 'UNHCR considers the delays in processing and handing down decisions for asylum-seekers, some who have been on Nauru since September 2012, to be unacceptable. It is of deep concern that only one claim for refugee status has been finally determined in the 14 months since asylum-seekers were initially transferred to the [processing centre], and this was in an exceptional case of an unaccompanied minor who was being transferred back to Australia.'[77]

Children

During UNHCR's visit in October 2013, there were 95 children detained at Nauru.[78] UNHCR expressed significant concern about this:

> 'At the time of UNHCR's visit, children were in closed detention, in difficult conditions, without access to adequate educational and recreational facilities, and with a lack of a durable solution within a reasonable timeframe.
>
> On the basis of the harsh conditions at the [processing centre], UNHCRs view is that the current facilities and arrangements in place are inappropriate for the support and protection of children. Any transfer of [unaccompanied and separated children] would be highly inappropriate.'[79]

According to UNHCR, 'no child, whether an unaccompanied child or within a family group, should be transferred from Australia to Nauru.'[80]

Return-oriented environment

Both Amnesty International and UNHCR, although supporting the right of asylum seekers to voluntarily return to their home countries, expressed their concern about pressures on asylum seekers to return home, because of the conditions on Nauru.

UNHCR expressed its deep concern about a 'pervasive climate [on Nauru] which places an overt emphasis on promoting return'.[81] Problematically, this could lead to *refoulement*:

> '[S]ome asylum-seekers at the [processing centre] who may be *bona fide* refugees, or in need of complementary protection, may contemplate a return to their country of origin as a result of the combined uncertainty around processes in Nauru, the prospect of lengthy delays in accessing a permanent solution, the harsh conditions, and the lack of the prospect of a durable solution.'[82]

According to Amnesty International:

> 'A number of men reported that they were considering returning home, despite still fearing for their safety. At least one man stated that he may have to return in order to protect his family, but would be forced to flee again this time taking his family with him.'[83]

Durable solutions

On 19 July 2013, the Australian Government announced its policy that asylum seekers arriving by boat would not be settled in Australia if found to be refugees.

UNHCR has expressed concern about the resulting uncertainty about durable solutions for asylum seekers on Nauru who arrived after 19 July 2013:

> ‘The 3 August [Memorandum of Understanding between Australia and Nauru] envisages that some refugees may be able to settle in Nauru, although it is not clear from the formal arrangements whether Nauru is committed, or even capable of, offering long term and durable solutions to those to whom it owes protection under the 1951 Refugee Convention.’[84]

The capacity of Nauru to accommodate refugees is questionable. According to UNHCR:

> ‘The current socio-economic and demographic identity in Nauru makes it very unlikely that recognized refugees will be able to find a sustainable, long term solution in Nauru itself.’[85]

Conclusion

Following its visit to Nauru in October 2013, UNHCR reported:

> ‘[C]urrent policies, conditions and operational approaches at the [processing centre] do not comply with international standards and in particular:
>
> a) constitute arbitrary and mandatory detention under international law;
> b) despite a sound legal framework, do not provide a fair, efficient and expeditious system for assessing refugee claims;
> c) do not provide safe and humane conditions of treatment in detention; and
> d) do not provide for adequate and timely solutions for refugees.’[86]

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[1] Amnesty International, *This is Breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (2013) 36 <http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf>
[2] Amnesty International, above n 1, 36; UNHCR, *Monitoring Visit to Manus Island, Papua New Guinea, 23–25 October 2013* (26 November 2013) (*October Visit*) 15 <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>.
[3] Amnesty International, above n 1, 48.
[4] UNHCR, *Mission to Manus Island, Papua New Guinea, 15–17 January* 2013 (4 February 2013) (*January Visit*) 5 (n 1) <http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf>.
[5] Amnesty International, above n 1, 19.
[6] UNHCR, *January Visit*, above n 4, 14.
[7] UNHCR, *January Visit*, above n 4, 15.
[8] UNHCR, *January Visit*, above n 4, 15.
[9] UNHCR, *January Visit*, above n 4, 14.
[10] UNHCR, *January Visit*, above n 4, 14.
[11] UNHCR, *Monitoring Visit to Manus Island, Papua New Guinea, 11–13 June 2013* (12 July 2013) (*June Visit*) 10 <http://unhcr.org.au/unhcr/files/2013-07-12_Manus_Island_Report_Final%281%29.pdf?_ga=1.90162780.636001340.1361407032>.
[12] UNHCR, *October Visit*, above n 2, 17.
[13] UNHCR, *October Visit*, above n 2, 18.
[14] Amnesty International, above n 1, 37.
[15] Amnesty International, above n 1, 37.
[16] Amnesty International, above n 1, 39.
[17] Amnesty International, above n 1, 18–19; Amnesty International, above n 1, 36–47.

[18] Amnesty International, above n 1, 39.
[19] Amnesty International, above n 1, 39.
[20] Amnesty International, above n 1, 40.
[21] Amnesty International, above n 1, 40–1.
[22] Amnesty International, above n 1, 44–5; UNHCR, *October Visit*, above n 2, 20.
[23] UNHCR, *January Visit*, above n 4, 19.
[24] UNHCR, *October Visit*, above n 2, 23.
[25] Amnesty International, above n 1, 52.
[26] Amnesty International, above n 1, 54 (footnotes omitted).
[27] Amnesty International, above n 1, 52.
[28] Amnesty International, above n 1, 53.
[29] Amnesty International, above n 1, 53.
[30] UNHCR, *October Visit*, above n 2, 17. See also UNHCR, *June Visit*, above n 11, 12; UNHCR, *January Visit*, above n 4, 13–14.
[31] Amnesty International, above n 1, 3–4.
[32] UNHCR, *January Visit*, above n 4, 8.
[33] UNHCR, *January Visit*, above n 4, 8.
[34] UNHCR, *June Visit*, above n 11, 1.
[35] UNHCR, *June Visit*, above n 11, 8; UNHCR, *October Visit*, above n 2, 10.
[36] Amnesty International, above n 1, 8.
[37] UNHCR, *October Visit*, above n 2, 1.
[38] UNHCR, *October Visit*, above n 2, 8.
[39] UNHCR, *January Visit*, above n 4, 16.
[40] UNHCR, *January Visit*, above n 4, 17.
[41] UNHCR, *October Visit*, above n 2, 17–19.
[42] UNHCR, *October Visit*, above n 2, 19.
[43] Amnesty International, above n 1, 7.
[44] Amnesty International, above n 1, 7.
[45] Amnesty International, above n 1, 77.
[46] Amnesty International, above n 1, 8.
[47] Amnesty International, above n 1, 8.
[48] Amnesty International, above n 1, 8.
[49] UNHCR, *October Visit*, above n 2, 24. See also UNHCR, *June Visit*, above n 11, 16–17.
[50] UNHCR, *October Visit*, above n 2, 24.
[51] Amnesty International, above n 1, 66.
[52] UNHCR, *October Visit*, above n 2, 24.
[53] UNHCR, *October Visit*, above n 2, 3.
[54] Amnesty International, above n 1, 7.
[55] UNHCR, *October Visit*, above n 2, 26.
[56] UNHCR, *October Visit*, above n 2, 1.
[57] Amnesty International, above n 1, 4.
[58] UNHCR, *Monitoring Visit to the Republic of Nauru, 7–9 October 2013* (26 November 2013) (*October Visit*) 13 <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>.
[59] UNHCR, *Mission to the Republic of Nauru, 3–5 December 2012* (14 December 2012) (*December 2012 Visit*) 9 <http://unhcr.org.au/unhcr/images/Amended%20footnote%202012-12-14%20nauru%20monitoring%20report%20final_2.pdf>.
[60] Amnesty International, *Media Release & Nauru Brief* (23 November 2012) <http://www.amnesty.org.au/images/uploads/news/NauruOffshoreProcessingFacilityReview2012.pdf>.
[61] UNHCR, *October Visit*, above n 58, 5.
[62] UNHCR, *October Visit*, above n 58, 13.
[63] UNHCR, *October Visit*, above n 58, 14–5.
[64] UNHCR, *October Visit*, above n 58, 16.
[65] UNHCR, *October Visit*, above n 58, 16.
[66] UNHCR, *October Visit*, above n 58, 16 (footnotes omitted).
[67] UNHCR, *December 2012 Visit*, above n 59.
[68] UNHCR, *October Visit*, above n 58, 21.
[69] Amnesty International, above n 60.

[70] UNHCR, *October Visit*, above n 58, 21.
[71] UNHCR, *October Visit*, above n 58, 20.
[72] Amnesty International, above n 60; UNHCR, *October Visit*, above n 58, 13.
[73] UNHCR, *October Visit*, above n 58, 2.
[74] Amnesty International, above n 60.
[75] UNHCR, *October Visit*, above n 58, 8.
[76] UNHCR, *October Visit*, above n 58, 7.
[77] UNHCR, *October Visit*, above n 58, 9.
[78] UNHCR, *October Visit*, above n 58, 18.
[79] UNHCR, *October Visit*, above n 58, 20.
[80] UNHCR, *October Visit*, above n 58, 2.
[81] UNHCR, *October Visit*, above n 58, 25.
[82] UNHCR, *October Visit*, above n 58, 25.
[83] Amnesty International, above n 60.
[84] UNHCR, *October Visit*, above n 58, 23.
[85] UNHCR, *October Visit*, above n 58, 24.
[86] UNHCR, *October Visit*, above n 58, 1.