



Australian  
Human Rights  
Commission

# Inquiry into the incident at the Manus Island Detention Centre from 16 February to 18 February

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO  
THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS  
REFERENCES COMMITTEE**

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## **1 Introduction**

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs References Committee in its inquiry into the incident at the Manus Island Detention Centre (MIDC) from 16 February to 18 February 2014.
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.
3. The Commission notes that the Committee's inquiry is essentially an investigation into the sequence of events at the MIDC in Papua New Guinea (PNG) from 16 February 2014 to 18 February 2014 which led to the death of one asylum seeker who was detained in the centre, Reza Berati, and the injury of 62 other asylum seekers.<sup>1</sup> The Committee is also inquiring into the relevant actions and responsibility of the Department of Immigration and Border Protection, its contractors, subcontractors and service providers, and the Minister for Immigration and Border Protection.
4. The Commission's submission is confined to the inquiry's Term of Reference (k) 'the Australian Government's duty of care obligations and responsibilities', in light of Australia's human rights obligations.
5. The Commission's submission will set out the circumstances in which the Australian Government's international human rights obligations will extend to the treatment of asylum seekers transferred to and detained in the MIDC, and the content of those obligations most relevant to the incident on Manus Island. The Commission's submission will not provide information about or include commentary on the events at the MIDC from 16 to 18 February 2014, or the involvement of the different parties.

## **2 Summary**

6. Under international law, Australia remains bound to ensure the human rights of asylum seekers if it has 'effective control' over asylum seekers it has transferred to another country, or over a regional processing centre to which they have been transferred. The Commission considers that there are a number of factors which would support the conclusion that Australia is exercising effective control over the asylum seekers transferred to and detained on Manus Island.
7. The most important human rights obligations regarding those detained in the MIDC include obligations:
  - (1) to protect the lives and prevent the deaths of the asylum seekers (including at the hands of third parties)
  - (2) to protect the dignity and physical and mental integrity of the asylum seekers (including protecting them from assaults and injuries by others)
  - (3) to refrain from detaining the asylum seekers arbitrarily
  - (4) to monitor closely the situation with the MIDC

- (5) to account for the cause and circumstances of Reza Berati's death, and to that end to conduct an effective investigation into the events which led to his death
- (6) to provide an effective remedy in the event that the above investigation reveals that violations of human rights occurred
- (7) to act to prevent future violations from occurring in similar circumstances, including, if necessary, changing laws and practices regarding the transfer of asylum seekers to PNG.

### **3 Australia's responsibility under international law**

#### **3.1 *Australia is responsible if it exercises 'effective control' over asylum seekers or the MIDC***

8. The Commission has repeatedly emphasised that Australia cannot avoid its human rights obligations under international law by transferring asylum seekers to a third country.<sup>2</sup> If Australia has 'effective control' over asylum seekers whom it has transferred to another country, or over a regional processing centre to which they have been transferred, then it is bound to continue to treat them consistently with human rights treaties to which Australia is a party.<sup>3</sup>
9. Australia's obligations under the *International Covenant on Civil and Political Rights*<sup>4</sup> (ICCPR) extend to all individuals 'within its territory and subject to its jurisdiction'.<sup>5</sup> These obligations include those who are outside Australian territory but subject to Australia's jurisdiction.<sup>6</sup> In order for a person outside the territory of a State to be regarded as 'subject to its jurisdiction', it is necessary to establish that the person is within the power or effective control of that State.<sup>7</sup>
10. It will be only in exceptional cases that persons outside the territory of a State will be regarded as subject to its jurisdiction.<sup>8</sup> However, the European Court of Human Rights has said that one circumstance in which a State will be found to have extraterritorial jurisdiction arises where:

through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government ... Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.<sup>9</sup>

#### **3.2 *Factors supporting a conclusion of 'effective control'***

11. This submission does not purport to provide a comprehensive analysis of the legal and factual situation surrounding the establishment and operation of the MIDC in order to determine whether Australia is exercising effective control of the facility or the detainees. However, the Commission notes that there are a

number of factors that would support the conclusion that Australia is exercising effective control over the MIDC, including the facts that:

- In August 2012 the Australian Government reinstated a system of third country processing for asylum seekers who arrived by boat without authorisation.
- On 8 September 2012 the Australian Government signed a Memorandum of Understanding with the Government of PNG ‘relating to the transfer and assessment’ of asylum seekers in PNG (the 2012 MOU).<sup>10</sup>
- In November 2012 the Australian Government began transferring asylum seekers to Manus Island.
- On 19 July 2013 the Australian Government announced a Regional Resettlement Arrangement with the Government of PNG, and on 6 August 2013 it entered into a new Memorandum of Understanding with PNG to support the Arrangement (the 2013 MOU).<sup>11</sup> The 2013 MOU replaced the 2012 MOU.
- Both the 2012 MOU and the 2013 MOU:
  - a. provided that the Australian Government would bear all costs incurred under those MOUs
  - b. contained a ‘commitment’ that both governments would ‘treat Transferees’ or ‘ensure that Transferees are treated’ ‘with dignity and respect and in accordance with relevant human rights standards’
  - c. provided for the establishment of a Joint Committee, jointly chaired by Australian and PNG officials, which would have ‘responsibility for the oversight of practical arrangements required to implement this MOU’.
- It appears that the MIDC is being operated by contractors pursuant to arrangements with Australia, and that those contractors report to Australia about the performance of those contracts.

12. The Parliamentary Joint Committee on Human Rights (PJCHR) considered detailed submissions and evidence in relation to this issue in the course of its examination of the legislation underpinning Australia’s ‘regional processing’ regime. In its 2013 report the PJCHR noted that:

Australia’s involvement in the arrangements relating to the detention, upkeep and provision of services to persons transferred from Australia for the processing of asylum claims in Manus Island and Nauru is significant.<sup>12</sup>

The PJCHR concluded that ‘the evidence demonstrates that Australia could be viewed as exercising “effective control” of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru’.<sup>13</sup>

13. The United Nations High Commissioner for Refugees (UNHCR) has come to a similar conclusion to that of the PJCHR regarding Australia’s responsibility for the treatment of asylum seekers in PNG. In its report following its mission to Manus Island in January 2013, UNHCR stated that:

The terms under which transfers have taken place and will continue to take place as well as the significant de facto control exercised by Australian officials and contractors on Manus Island reinforce UNHCR's view that legal responsibility under international law for the care and protection of all transferees from Australia to PNG remains with both contracting States.<sup>14</sup>

#### **4 International human rights obligations regarding treatment of people in detention**

14. The Australian Government's duty of care obligations and responsibilities regarding those detained in the MIDC must be considered in light of the following human rights:

- right to life (article 6(1) of the ICCPR)
- right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (article 7 of the ICCPR)
- right to be treated with humanity and respect while in detention (article 10 of the ICCPR)
- right to be free from arbitrary detention (article 9(1) of the ICCPR)
- right to an effective remedy in the case of a violation of rights, which, in the case of an alleged violation of articles 6 or 7, includes an effective investigation (articles 2(3), 6 and 7 of the ICCPR).

15. The Commission has consistently and repeatedly raised concerns that the 'regional processing' regime may lead to breaches of Australia's obligations under international law.<sup>15</sup> The Commission has stated that the detention of individuals in the MIDC raises serious concerns, including because:

- their detention, for long periods of time, without individualised assessments of the need to detain (or to continue to detain) them, may be contrary to the obligation under article 9(1) of the ICCPR, and
- their detention in the MIDC may expose them to conditions and treatment which may breach Australia's obligations under articles 10 and 7 of the ICCPR.<sup>16</sup>

##### **4.1 *Obligation to protect life and prevent death (article 6)***

16. The right to life is provided for by article 6(1) of the ICCPR as follows:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

17. The right to life creates an obligation on the part of the State to take positive steps to protect life.<sup>17</sup> A particular duty is owed to persons in detention. The UN Human Rights Committee (HRC) has stated that pursuant to their obligations under article 6(1) of the ICCPR 'it is incumbent on States to ensure the right of life of detainees', as 'the essential fact' is that 'the State party by...detaining individuals takes the responsibility to care for their life.'<sup>18</sup>

18. This responsibility includes protecting detainees from fatal violence at the hands of others (or themselves), because the act of detaining a person impairs or removes that person's ability to protect themselves from threats to their physical safety. In *Barbato v Uruguay* the HRC recognized that the State has a duty under article 6(1) to take adequate measures to protect the life of a prisoner against suicide, forced suicide and killing by others while in custody.<sup>19</sup>
19. This obligation is particularly relevant in the circumstances, given that the Minister for Immigration and Border Protection has stated that the majority of the events which occurred on 16-18 February, including, information suggests, those which resulted in Mr Berati's death, occurred *within* the MIDC.<sup>20</sup>

#### **4.2 *Obligation to protect the dignity and physical and mental integrity of persons in detention (articles 7 and 10)***

20. Given that the incident at the MIDC in February resulted not only in the death of Reza Berati but also the injury of 62 other transferees, it is relevant to consider the Australian Government's obligations under articles 7 and 10 of the ICCPR, as well as article 6.
21. Article 7 of the ICCPR provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' The prohibition under article 7 has been further articulated under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),<sup>21</sup> to which Australia is also a party.
22. Article 7 of the ICCPR protects the dignity and the physical and mental integrity of the individual.<sup>22</sup> The HRC has stated that it is implicit in article 7 that 'States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.'<sup>23</sup>
23. Article 10(1) of the ICCPR imposes further positive obligations which are directed specifically at the rights of detained persons. Article 10(1) provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'
24. The HRC has stated that article 10(1) imposes on States a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty.<sup>24</sup> As mentioned above, this vulnerability includes detainees' general inability to take the steps a free person could to protect themselves.
25. The HRC has considered that the positive duty under article 10(1) extends to taking adequate measures to protect detainees from being assaulted by others.<sup>25</sup>

#### **4.3 *Obligation not to detain persons arbitrarily (article 9)***

26. As referred to above, the human rights obligations under article 6 and 7 are heightened (and in the case of article 10, only arise) because of the fact that

asylum seekers who are sent to Manus Island are held in a closed detention facility, where they have no freedom of movement.

27. The fact of their detention raises issues under article 9(1) of the ICCPR, which provides that no one should be subjected to arbitrary detention. The HRC has held that detention will be arbitrary when it continues beyond the period for which the State Party can provide appropriate justification.<sup>26</sup>
28. The Commission has repeatedly raised concerns that the mandatory and indefinite detention of asylum seekers on Manus Island may violate article 9(1).<sup>27</sup> Similarly, the PJCHR in June 2013 concluded that the delays in processing and continued detention of asylum seekers in PNG (and Nauru) 'appear[ed] to constitute arbitrary detention'.<sup>28</sup>
29. Following its visit to Manus Island in October 2013, UNHCR also concluded that the practice of detaining all asylum seekers in the closed centre, on a mandatory and open-ended basis and without an assessment of the need for such detention, amounted to arbitrary detention in breach of international law.<sup>29</sup>

#### **4.4 *Obligation to closely monitor the situation within the MIDC***

30. Australia's duty under international law to provide adequate care to persons deprived of their liberty is non-delegable,<sup>30</sup> as it is under the Australian common law.<sup>31</sup> This extends to an obligation to monitor and review the activities of contractors engaged in the running of regional processing centres over which Australia has effective control. The purpose of this monitoring is to ensure that transferees' human rights are being respected and protected. Regular independent monitoring of detention facilities is an important safeguard against human rights abuses.<sup>32</sup>
31. However, during the period of Reza Berati's detention in the MIDC there was no independent body in place to monitor the conditions in that centre and the treatment of detainees. In fact, as at the date of this submission, the Joint Committee with responsibility for oversight of the 'regional processing' arrangements on Manus Island (for which both the 2012 and the 2013 MOUs had expressly provided) had still not been established.
32. Despite the absence of an independent monitoring or advisory body with responsibility for oversight of the MIDC, the Commission considers that the Australian Government was 'on notice' as to the risks to the safety of the asylum seekers being detained on Manus Island.
33. In November 2013 and December 2013, UNHCR and Amnesty International respectively published reports following their visits to Manus Island. Both reports raised concerns about safety and security in the MIDC.
34. UNHCR and Amnesty both described reports from asylum seekers about an altercation on 18 October 2013 between PNG police and the PNG army outside of the MIDC (but in view of the detainees), which caused the asylum seekers to fear for their safety.<sup>33</sup> Amnesty International reported that '[m]any detainees interviewed believed that members of the local community were



attacking the facility and the asylum seekers.<sup>34</sup> The UNHCR concluded that the arrangements in place on Manus Island at the time of its visit (October 2013) did 'not provide safe and humane conditions of treatment in detention'.<sup>35</sup>

#### **4.5 *Obligation to undertake an effective investigation and (in the case of violations) to provide an effective remedy (articles 2(3), 6 and 7)***

35. The ICCPR places an obligation on States Parties to provide an effective remedy to persons whose human rights are violated.<sup>36</sup> The HRC has stated that in order to ensure that individuals have accessible and effective remedies, the ICCPR places on States Parties a 'general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies'.<sup>37</sup>

36. In the event of a death in detention, the duty to investigate forms part of the State's obligations under article 6(1), such that a failure to take appropriate measures or to exercise due diligence to investigate the death and punish those responsible (including private persons or entities) may result in a violation by the State of the right to life.<sup>38</sup>

37. Article 7 (in conjunction with article 2(3)) of the ICCPR similarly requires allegations of ill-treatment which may violate the article to be investigated 'promptly and impartially by competent authorities'.<sup>39</sup>

38. Given that it appears Reza Berati sustained his fatal injuries inside the MIDC, there is a strong onus on those responsible for his detention to account for how he died. In relation to the equivalent right to life under article 2(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>40</sup> the European Court of Human Rights has repeatedly emphasised that:

in the case of persons within [authorities'] control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.<sup>41</sup>

39. The reason for this is because of the duty authorities assume when they detain a person. As the European Court of Human Rights has explained:

Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.<sup>42</sup>

40. The House of Lords has explained that the purposes of an investigation where a person dies in state custody are:

to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrong-doing (if justified) is allayed; that dangerous practices and

procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.<sup>43</sup>

41. The European Court of Human Rights has stated that the minimum requirements for an 'effective' investigation under article 2(1) include:

- The investigation should be carried out by persons who are independent from those who are implicated in the death.
- The authorities must take all reasonable steps available to secure the evidence concerning the incident, including eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.
- The investigation should be carried out promptly and with reasonable expedition.
- There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability.<sup>44</sup>

42. Following an effective investigation into allegations of breaches of articles 6 or 7, article 2(3) of the ICCPR places an obligation on States Parties to prosecute those suspected of involvement in the breaches. The HRC has stated that:

Where the investigations...reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.<sup>45</sup>

43. The obligation to provide an effective remedy also, according to the HRC, requires reparation to the person whose rights have been violated (or, in the event of death, their family). Reparations can 'involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices'.<sup>46</sup>

#### **4.6 *Obligation to prevent future violations***

44. In relation to the last-mentioned aspects of reparations, it is important to note that the HRC views the positive obligations under article 2 as including a duty to take steps to ensure that further breaches of the rights in the ICCPR do not occur in similar circumstances. The HRC has stated that:

In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee...to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.<sup>47</sup>

45. Therefore, the obligation to investigate the incident on Manus Island and, in the event that a violation of articles 6 and/or 7 (and/or 10) has occurred, to

provide an effective remedy, would include an obligation to review those laws and practices which created an environment in which the violations occurred.

46. In terms of Australia's legal responsibility, the relevant laws and practices are those which comprise Australia's 'regional processing' regime. This regime requires the transfer to PNG of asylum seekers who come by boat to Australia without authorisation.

47. In the event that the investigation into the incident on Manus Island, and specifically into Reza Berati's death, reveals that the conditions and treatment of asylum seekers in the MIDC contributed to violations of the ICCPR, the Australian Government would be under an obligation under article 2 to review the practice of detaining asylum seekers in the MIDC.

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- <sup>1</sup> Minister for Immigration and Border Protection, 'Manus Island incident, Operation Sovereign Borders, joint review' (Press Conference, 21 February 2014). At <http://www.minister.immi.gov.au/media/sm/2014/sm212027.htm> (viewed 16 May 2014).
- <sup>2</sup> See for example Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights' Examination of the Migration (Regional Processing) package of legislation* (January 2013), section 5. At <http://www.humanrights.gov.au/submissions/examination-migration-regional-processing-package-legislation#Heading273> (viewed 16 May 2014); Australian Human Rights Commission, *Asylum seekers, refugees and human rights: snapshot report 2013* (October 2013), section 3. At <http://www.humanrights.gov.au/publications/asylum-seekers-refugees-and-human-rights-snapshot-report> (viewed 16 May 2014).
- <sup>3</sup> See the decision of the European Court of Human Rights in *Al-Skeini v United Kingdom* [GC] [2011] ECHR 1093.
- <sup>4</sup> *International Covenant on Civil and Political Rights*, 1966. At <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html> (viewed 16 May 2014).
- <sup>5</sup> ICCPR, article 2.
- <sup>6</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 136, [109]; UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para [10]. At <http://www.refworld.org/docid/478b26ae2.html> (viewed 16 May 2014).
- <sup>7</sup> See, for example, *Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Situation of detainees at Guantánamo Bay*, UN Doc E/CN.4/2006/120 at [11]. At <http://www.refworld.org/docid/45377b0b0.html> (viewed 16 May 2014).
- <sup>8</sup> *Al-Skeini v United Kingdom* [GC] [2011] ECHR 1093, [131].
- <sup>9</sup> *Al-Skeini v United Kingdom* [GC] [2011] ECHR 1093, [135].
- <sup>10</sup> A copy of the Memorandum of Understanding was included in the group of documents tabled with the designation of PNG as a 'regional processing country' on 9 October 2012. A copy of this set of documents is available at <http://www.humanrights.gov.au/transfer-asylum-seekers-third-countries> (viewed 16 May 2014).
- <sup>11</sup> A copy of the 2013 Memorandum of Understanding with PNG is available at <http://www.dfat.gov.au/geo/png/joint-mou-20130806.html> (viewed 16 May 2014).
- <sup>12</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Ninth Report of 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation* (2013), para [2.54]. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Completed\\_inquiries/2013/2013/92013/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/92013/index) (viewed 16 May 2014).
- <sup>13</sup> Parliamentary Joint Committee on Human Rights, above, para [2.55].

- <sup>14</sup> United Nations High Commissioner for Refugees (UNHCR), *UNHCR Mission to Manus Island, Papua New Guinea, 15-17 January 2013* (2013), pp 7-8. At <http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf> (viewed 16 May 2014). UNHCR reiterated this position following its visit to Manus Island in October 2013: see UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23-25 October 2013* (2013), p 6. At <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf> (viewed 16 May 2014).
- <sup>15</sup> See for example, Australian Human Rights Commission, *Submission*, note 2; Australian Human Rights Commission, *Asylum seekers, refugees and human rights*, note 2, section 3.
- <sup>16</sup> See Australian Human Rights Commission, *Asylum seekers, refugees and human rights*, above, sections 3(b) and (c).
- <sup>17</sup> Human Rights Committee, *General Comment 6, Article 6: The Right to Life* (1982), UN Doc HRI/GEN/1/Rev.1 at 6 (1994), [5]. At <http://www.refworld.org/docid/45388400a.html> (viewed 16 May 2014).
- <sup>18</sup> Human Rights Committee, *Lantsova v Russian Federation*, Communication No 763/1999, UN Doc CCPR/C/74/D/763/1997(2002), para [9.2]. At [http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/state/143/node/4/filename/russia\\_t5\\_iccpr\\_763\\_1997](http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/state/143/node/4/filename/russia_t5_iccpr_763_1997) (viewed 16 May 2014). See also Human Rights Committee, *Fabrikant v Canada*, Communication No 970/2001, UN Doc CCPR/C/79/D/970/2001 (2003), para [9.3], wherein the Committee stated that ‘the State party remains responsible for the life and well-being of its detainees.’ At [http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/node/4/filename/canada\\_t5\\_iccpr\\_970\\_2001](http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/node/4/filename/canada_t5_iccpr_970_2001) (viewed 16 May 2014).
- <sup>19</sup> Human Rights Committee, *Barbato v Uruguay*, Communication No. 84/1981, UN Doc CCPR/C/OP/ at 112 (1990), paras [9.2] and [10(a)]. At [http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/node/4/filename/124\\_uruguay84\\_vws](http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/node/4/filename/124_uruguay84_vws) (viewed 16 May 2014). See also P H van Kempen, ‘Positive Obligations to Ensure the Human Rights of Prisoners: Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family under the ICCPR, the ECHR, the ACHR and the AfChHPR’ in P J P Tak and M Jendly (eds), *Prisoners Policy and Prisoners Rights: Protection of Fundamental Rights of Prisoners in International and Domestic Law* (2008), p 26.
- <sup>20</sup> Minister for Immigration and Border Protection, note 1.
- <sup>21</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984. At <http://www.humanrights.gov.au/convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-human-rights> (viewed 16 May 2014).
- <sup>22</sup> 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.1 at 30 (1994), para [2]. At <http://www.refworld.org/docid/453883fb0.html> (viewed 16 May 2014).
- <sup>23</sup> Human Rights Committee, *General Comment No. 31*, note 6, para [8].
- <sup>24</sup> Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, UN Doc HRI/GEN/1/Rev.1 at 33 (1994), para [3]. At <http://www.refworld.org/docid/453883fb11.html> (viewed 16 May 2014).
- <sup>25</sup> Human Rights Committee, *Daley v Jamaica*, Communication No 750/1997, UN Doc CCPR/C/63/D/750/1997 (1998), para [7.6], at [http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/state/86/node/4/filename/243\\_jamaicaview750](http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/state/86/node/4/filename/243_jamaicaview750) (viewed 16 May 2014); *Wilson v Philippines*, Communication No 868/1999, UN Doc CCPR/C/79/D/868/1999 (2003), para [7.3], at [http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/philippines\\_t5\\_iccpr\\_868\\_1999](http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/philippines_t5_iccpr_868_1999) (viewed 16 May 2014).
- <sup>26</sup> Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), para [9.4], at <http://www.unhcr.org/refworld/docid/3ae6b71a0.html> (viewed 16 May 2014); Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), para [8.2], at <http://www.unhcr.org/refworld/docid/3f588ef00.html> (viewed 16 May 2014).
- <sup>27</sup> See Australian Human Rights Commission, *Submission*, note 2, section 11; Australian Human Rights Commission, *Asylum seekers, refugees and human rights: snapshot report 2013*, note 2, section 3(b).

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- <sup>28</sup> Parliamentary Joint Committee on Human Rights, note 12, para [2.196].
- <sup>29</sup> UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23-25 October 2013*, note 14, para 80.
- <sup>30</sup> See, for example, *Cabal and Bertran v Australia*, Communication No 1020/2001, UN Doc. CCPR/C/78/D/1020/2001, (2003), para 7.2: ‘The Committee considers that the contracting out to the private sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10. At <http://www.refworld.org/docid/4282279b7.html> (viewed 16 May 2014).
- <sup>31</sup> See, for example, *New South Wales v Bujdosó* (2005) 227 CLR 1, esp at 13-4 [44] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *Findings in the Inquests into the Deaths of Joseph Rauluni, Ahmed Obeid Al-Akabi and David Saunders at Villawood Detention Centre, New South Wales, in 2010*, Magistrate M Jerram, NSW State Coroner, 19 December 2011, p 10, in which Magistrate Jerram held ‘that DIAC owes a non-delegable duty of care to immigration detainees is indisputable’.
- <sup>32</sup> See Human Rights Committee, *General Comment No. 21*, note 24, para [6]; Human Rights Committee, *General Comment No. 20*, note 22, para [11].
- <sup>33</sup> UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23-25 October 2013*, note 14, p 22; Amnesty International, *This is Breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (11 December 2013), pp 48-9. At [http://www.amnesty.org.au/images/uploads/about/Amnesty\\_International\\_Manus\\_Island\\_report.pdf](http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf) (viewed 16 May 2014).
- <sup>34</sup> Amnesty International, above, p 49.
- <sup>35</sup> UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23-25 October 2013*, note 14, p 1.
- <sup>36</sup> ICCPR, 1966, art 2(3).
- <sup>37</sup> Human Rights Committee, *General Comment No. 31*, note 6, para [15].
- <sup>38</sup> See Human Rights Committee, *General Comment No. 31*, above, para [8].
- <sup>39</sup> Human Rights Committee, *General Comment No. 20*, note 22, para 14. See also *Blanco v Nicaragua*, Communication No 328/1988, UN Doc CCPR/C/51/D/328/1988 (1994), para 10.6. At [http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/100\\_nicaraguavws328](http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/100_nicaraguavws328) (viewed 16 May 2014).
- <sup>40</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950. At <http://conventions.coe.int/treaty/en/treaties/html/005.htm> (viewed 16 May 2014).
- <sup>41</sup> *Orhan v Turkey*, App No 25656/94, 18 June 2002, [327] (see also the cases cited therein).
- <sup>42</sup> *Salman v Turkey* (2002) 34 EHRR 425, 482 [99] (footnotes omitted).
- <sup>43</sup> *R (Amin) v Secretary of State* [2003] 4 All ER 1264, 1281 [31] (Ld Bingham).
- <sup>44</sup> *Slimani v France*, App. No 57671/00, 27 July 2004, [32].
- <sup>45</sup> Human Rights Committee, *General Comment No. 31*, note 6, para [18].
- <sup>46</sup> Human Rights Committee, *General Comment No. 31*, above, para [16].
- <sup>47</sup> Human Rights Committee, *General Comment No. 31*, above, para [17].