



Submission to Senate Legal and Constitutional
Affairs References Committee

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

2 May 2014

www.hrlc.org.au

Freedom. Respect. Equality. Dignity. **Action.**

Contact

Daniel Webb and Louise Brown
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

Human Rights Law Centre

The Human Rights Law Centre protects and promotes human rights in Australia and beyond through a strategic mix of legal action, advocacy, education and capacity building.

It is an independent and not-for-profit organisation and donations are tax-deductible.

Follow us at <http://twitter.com/rightsagenda>

Join us at www.facebook.com/pages/HumanRightsLawResourceCentre

Contents

1.	EXECUTIVE SUMMARY	2
2.	SCOPE OF HRLC SUBMISSION	2
3.	FACTORS THAT GAVE CAUSE TO THE INCIDENT	3
	3.1 Delays in processing and resettlement	4
	3.2 Uncertainty about processing and resettlement	6
	3.3 Harsh conditions	7
	3.4 The resultant tension	9
4.	INVOLVEMENT AND RESPONSE OF DEPARTMENT AND MINISTER	10
	4.1 Lack of transparency	10
	4.2 Blaming the victims	11
5.	THE GOVERNMENT'S RESPONSIBILITIES	12
	5.1 Legal basis for extraterritorial obligations	12
	5.2 Factual basis for Australia's human rights obligations at the RPC	13
	5.3 Human rights and international law violations	13
6.	CONCLUSION: KEY CONCERNS	15

1. Executive Summary

1. The Senate Legal and Constitutional Affairs References Committee (**Committee**) has asked for submissions in relation to its inquiry into the incident at the Manus Island Detention Centre from 16 February to 18 February 2014. That incident saw the death of one asylum seeker, Reza Berati, and the serious injury of many others.
2. The violence involved was horrific. Much of it appears to have been perpetrated by people in positions of care and responsibility for asylum seekers. The individuals responsible should be held to account.
3. More broadly though, these events require honest and forthright review by Australia as to the extent to which our policies and the manner of their implementation precipitated the unrest.
4. The events of 16-18 February did not occur in a vacuum. They occurred in the context of policy arrangements which are inherently harmful and breach international law.
5. It has been almost 18 months since the first transfers to Manus took place. Not one refugee status determination has been completed and not one refugee has been resettled. Approximately 1300 men currently languish in harsh conditions, separated from family, with no certainty as to if, when or to where they will ultimately be resettled.
6. Many will have genuinely fled persecution. Leaving them in limbo will inevitably cause harm and lead to unrest.
7. It has done so, with tragic consequences. Australia has failed to take reasonable steps to prevent that unrest and is thus, both as a matter of law and principle, responsible for it and its consequences.
8. There needs to be an urgent overhaul of the current arrangements to ensure such events do not occur again. Changes need to focus not just on increasing security but also on decreasing cruelty.

2. Scope of HRLC submission

9. Through its involvement in the PNG National Court inquiry into whether the Manus detention facility complies with Papua New Guinean law and its inspection of the Manus Island Regional Processing Centre (**RPC**) itself, the Human Rights Law Centre (**HRLC**) has first-hand knowledge of conditions inside the centre and a detailed understanding of the arrangements and legal framework underpinning them.

10. The HRLC does not, however, have first-hand knowledge of the sequence of events which took place on 16-18 February.
11. As such, this submission will address the following elements of the Committee's terms of reference:
 - The factors that gave cause to the incident (b);
 - Department of Immigration and Border Protection involvement and response (e);
 - Minister for Immigration and Border control's conduct (g);
 - The Australian Government's duty of care obligations and responsibilities (k);
 - Refugee status determination processing and resettlement arrangements in PNG (l); and
 - Other related matters (m).

3. Factors that gave cause to the incident¹

12. The HRLC urges the Committee to examine the root causes of the violence on 16-18 February.
13. It has been widely reported that the violence was an escalation of, and response to, simmering tensions within the centre.²
14. The HRLC's view is that these tensions are the result of:
 - (a) excessive delays in processing and resettlement;
 - (b) the limited, and at times conflicting, information given to detainees about their processing and resettlement; and
 - (c) the austere physical conditions inside the Manus RPC.

¹ This section contains submissions relevant to (b) and (l) of the Terms of Reference.

² See e.g. Press Statement, 'Preliminary Observations on the official visit to Papua New Guinea by Mr. Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, 3-14 March 2014', 14 March 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14373&LangID=E>; Ron Knight MP, quoted in David Wroe and Rory Callinan, 'Tensions at detention centre had been brewing for weeks, says Manus Island MP', *The Sydney Morning Herald*, 24 February 2014; Oliver Laughland, 'Fresh details revealed growing tensions before deadly Manus riot', *The Guardian Australia*, 27 April 2014.

3.1 Delays in processing and resettlement

15. The HRLC understand there are approximately 1300 asylum seekers currently detained at the Manus Island RPC. The first transfers took place in November 2012³, almost 18 months ago.
16. The HRLC is not aware of a single asylum seeker detained on Manus Island having been issued with a final refugee status determination or being resettled in PNG or elsewhere.
17. The delays in processing and resettlement were reportedly a key cause of tension at the RPC before the incident.⁴
18. These delays have been in part due to, and compounded by, the lack of a legal framework for the conduct of refugee status determinations and the absence of appropriate visa categories or a resettlement program.
19. The asylum seekers currently detained at the Manus Island RPC were transferred from Australia to Papua New Guinea pursuant to the Regional Resettlement Agreement (**RRA**) signed on 19 July 2013 by the Governments of Australia and Papua New Guinea. The RRA provides⁵:

...Papua New Guinea undertakes for an initial twelve month period to accept unauthorised maritime arrivals for processing and, if successful in their application for refugee status, resettlement...

...Papua New Guinea will undertake refugee status determination...
20. On 6 August 2013, the Governments of Australia and PNG entered into a new Memorandum of Understanding (**MOU**), which supports the RRA, and which supersedes the Memorandum of Understanding signed on 8 September 2012 (**2012 MOU**).⁶ Under the MOU, the Government of PNG commits to “make an assessment, or permit an assessment to be made” of whether or not an asylum seeker is a refugee under the *Refugee Convention*.⁷

³ Minister for Immigration and Citizenship, Media Release, 21 November 2012, ‘First transfer to Papua New Guinea’, available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2060960%22>

⁴ See e.g. Press Statement, ‘Preliminary Observations on the official visit to Papua New Guinea by Mr. Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, 3-14 March 2014’, 14 March 2014; former migration agent at Manus Island, Liz Thompson, interviewed on Dateline on 25 February 2014, transcript available at <http://www.sbs.com.au/dateline/story/transcript/id/601814/n/Manus-Insider>.

⁵ Regional Resettlement Agreement, paragraphs 3 - 4.

⁶ Available at <https://www.dfat.gov.au/geo/png/joint-mou-20130806.html>

⁷ Article 1A of the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees*.

21. There is still no clear and adequate legal or regulatory framework for conducting refugee status determination in PNG. Section 15A of PNG's *Migration Act 1980* (Act) empowers the Foreign Affairs Minister of PNG to determine whether a non-citizen is a "refugee", but provides no procedural or substantive guidance as to how a refugee status determination should be made by the Minister.⁸ It is also not clear from that Act the consequences that would flow from such a determination, other than that the Minister is empowered to make directions to refugees to reside in a relocation centre.⁹
22. Papua New Guinea did previously introduce provisions into the *Migration Regulations 1979*, which provided the Foreign Affairs Minister of PNG with guidance in respect of determining the refugee status of 'non-citizens' transferred under the 2012 MOU. However, these provisions have no application to people transferred under the new MOU. They are redundant and have not been replaced.¹⁰
23. Despite the absence of a legal framework some refugee status interviews have been conducted. The UNHCR has been advised that refugee status determination officers conducting refugee status determination assessments were using draft procedural guidelines which had not yet been finalised.¹¹
24. Amnesty International's report, *This is Breaking People*, produced after Amnesty International's visit to the Manus Island RPC in November 2013, described the interview process¹²:

The first interview in the Refugee Status Determination process on Manus Island is with a representative from the Claims Assistance Provider Scheme (CAPS), who assists asylum seekers in compiling evidence to support their claim for protection. CAPS officials are contracted through the Australian Government and primarily come from Australian law firm Playfair. Immigration officials we spoke to informed us, however, that CAPS officials are not contracted to act as lawyers for the asylum seekers and do not provide legal or advocacy services.

Renate Croker, DIBP's senior official at the detention centre, informed us that following the Australian federal election in September 2013, the newly elected Coalition Government removed access to CAPS officials for asylum seekers in the facility. Following discussions between Australian and Papua New Guinea Immigration, CAPS services were reinstated three to four weeks prior to our visit. This indicates that asylum seekers at the facility were left without

⁸ UNHCR, *UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, p 7.

⁹ Section 15C, *Migration Act 1980* (PNG).

¹⁰ UNHCR, *UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, p 7.

¹¹ UNHCR, *UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, p 10.

¹² Amnesty International, *This is Breaking People*, December 2013, pp 66-65.

CAPS officials to assist in compiling evidence of their protection claims, and it is unclear whether or not any new Refugee Status Determination interviews were carried out in the intervening period.

25. To the extent that there has been some *ad hoc* interviewing, by the end of 2013 only a small number of asylum seekers had begun that process.
26. By 15 November 2013, only 152 transferees on Manus had received individual protection claim advice and assistance to lodge a protection claim.¹³
27. Of those transferees who had submitted applications, only 50 asylum seekers had undergone an initial assessment interview.¹⁴
28. It ought to go without saying that the men detained on Manus have committed no crime. The purpose of their liberty deprivation cannot be to punish. It must be to process.
29. Plainly, that has not been happening with any efficacy.

3.2 Uncertainty about processing and resettlement

30. Leading up to the incident asylum seekers faced considerable uncertainty about their fate in every respect, notwithstanding the slowly progressing and *ad hoc* interview process a small number had begun participating in.¹⁵
31. In October 2013, UNHCR was advised by PNG Immigration and Citizenship Services Authority that the PNG Government did not intend to implement any timeframes in relation to the refugee status determination process and that its current policy was not to formally communicate approximate refugee status determination processing timeframes.¹⁶
32. It therefore appears to have been official policy to leave detainees completely in the dark as to the anticipated length of their detention.
33. Even asylum seekers who have been interviewed have reported not hearing anything further from authorities in relation to their claims, not being provided with an estimate of the time it will take to complete their processing and not being told when and where they would be resettled.¹⁷

¹³ Question on Notice 13/0361, Supplementary Budget Estimates Hearing, Immigration and Border Protection Portfolio, 19 November 2013.

¹⁴ Amnesty International, *This is Breaking People*, December 2013, pp 8, 61.

¹⁵ Amnesty International, *This is Breaking People*, December 2013, p 8.

¹⁶ UNHCR, *UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, p 10.

¹⁷ See e.g. Amnesty International, *This is Breaking People*, December 2013, pp 8-9.

34. The evidence presented by several asylum seekers to the recent PNG National Court inquiry confirmed how little they knew about the timeframe for their processing and plans (or lack thereof) for their eventual resettlement.
35. At least one asylum seeker reported to the National Court inquiry that the perceived deliberate and calculated delays, uncertainty and the lack of information on the progress of each of their cases has built an environment of mental stress and caused “mental torture”.
36. A migration agent who was working on Manus at the time of the incident stated that asylum seekers commenced their protests when officials at the centre had conceded that there were no plans in place for asylum seekers’ resettlement.¹⁸
37. More recently, some asylum seekers have reported being told that if they are found to be refugees, they will have no choice but to be resettled in Papua New Guinea and there have been public pronouncements to that effect from the respective Governments.¹⁹
38. However, no one has yet been resettled and the HRLC is not aware of any PNG legislation which provides a visa category for refugees in PNG.²⁰ The HRLC is also not aware of any arrangements explaining the terms on which, or the supports with which, refugees will be resettled.
39. Those detained on Manus remain uncertain as to Australia and PNG’s plans for their future. In the circumstances, their uncertainty is understandable and undoubtedly an ongoing cause of distress.

3.3 Harsh conditions

40. The harm caused by indefinite detention and uncertain resettlement prospects is being compounded by the austere conditions in which asylum seekers are being detained.

¹⁸ See e.g. Liz Thompson, as quoted in David Wroe, Sarah Whyte, Michael Gordon, ‘Deadly clash on Manus Island said to have begun after asylum seekers were told about ‘lies’, *The Sydney Morning Herald*, 26 February 2014 available at <http://www.smh.com.au/federal-politics/political-news/deadly-clash-on-manus-island-said-to-have-begun-after-asylum-seekers-were-told-about-lies-20140225-33fsg.html> (accessed 1 May 2014).

¹⁹ Joint Media Release from Hon. Scott Morrison MP, Minister for Immigration and Border Protection and Hon. Rimbink Pato, Papua New Guinea Minister for Foreign Affairs and Immigration, 3 April 2014, available at <http://www.minister.immi.gov.au/media/sm/2014/sm213227.htm>

²⁰ Despite the Papua New Guinean Minister for Foreign Affairs and Immigration’s announcement on 3 April 2014, that a refugee visa has been approved by the Government of PNG, the HRLC is not aware of the law which gives effect to that approval, and in any event, it does not appear that a refugee visa category was in place at the time of the events of 16 – 18 February. <http://www.minister.immi.gov.au/media/sm/2014/sm213227.htm>

41. The harsh nature of the conditions has been widely reported. The UNHCR has assessed them as being unsafe and inhumane and has falling short of international human rights standards.²¹
42. Asylum seekers sleep in cramped conditions, where the heat is stifling and privacy non-existent.²² Water is limited, health care and sanitation facilities are grossly inadequate, and asylum seekers are exposed to the elements.²³
43. Asylum seekers face constant pressure by officials to return home.²⁴ The combination of slow processing, limited information about plans for their eventual resettlement and harsh conditions create a return-orientated environment. Indeed, the fact that asylum seekers have been transferred to Manus for 18 months without the processing of a single claim being completed suggests the purpose of the facility is not to process and resettle but to pressure people into 'voluntarily' returning to their country of origin.
44. Asylum seekers also face threats to their personal safety. For instance, at least one asylum seeker has reported that the G4S guards threaten asylum seekers that if they do something wrong then PNG locals will come and attack them.²⁵
45. Numerous organisations including the UNHCR have expressed concerned about the serious psychosocial and physical impact of this detention on already vulnerable people, including self-harm and suicide attempts.²⁶
46. The HRLC, through its Director of Legal Advocacy, Daniel Webb, has observed these conditions first hand as part of the PNG National Court Inquiry. Our observations were:
 - (a) Conditions were appallingly overcrowded. In some rooms, the beds were packed in so tightly that there was no room to move between them. 'P Dorm' had 120 beds in it, each only a few centimetres apart, with no air-conditioning and just a few big industrial fans to ensure some minimal air flow.
 - (b) The security presence was overwhelming. There were guards everywhere – even escorting detainees within the centre. The security presence contributed to what was a

²¹ UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 23 to 25 October 2013*, 26 November 2013, p 1.

²² UNHCR, *UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, p 18; Amnesty International, *This is Breaking People*, December 2013, pp 39 – 40.

²³ Amnesty International Report, *This is Breaking People*, December 2013, pp 6, 40-43.

²⁴ Amnesty International, *This is Breaking People*, December 2013, pp 34-35, 66.

²⁵ Evidence presented to the PNG National Court Case HROI1 of 2014.

²⁶ See UNHCR Submission to the Expert Panel on Asylum -seekers, 27 July 2012, p.6; Amnesty International, *This is Breaking People*, December 2013, p 56.

noticeably tense, hostile and prison-like environment. Similar observations were made by the presiding National Court Judge, Justice Cannings.²⁷

- (c) The toilet and shower facilities in several of the compounds were damaged, dirty and mouldy. Several did not have running water.
- (d) There were clear signs of the detrimental impact indefinite detention in such harsh conditions was having on people. For instance, there was a sign on one of the fences reminding security personnel to keep their Hoffman knives with them while on duty Hoffman knives are curved blades used to cut down people attempting to hang themselves. We were also taken to one area where security staff advised “psych patients” were kept. The area included two shipping containers split into four rooms, each room containing one mattress on the floor, and was sealed off from the rest of the centre by a tall fence. The men detained therein were visibly distressed.

3.4 The resultant tension

47. UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, visited Manus Island recently to investigate the circumstances of Reza Berati’s death. At the completion of his visit Mr Heyns stated that:

it is my impression that the situation was caused primarily by the fact that the detainees find themselves in a possible dead-end street. They are on the one hand told by the authorities in the camp that they will be allowed to resettle in PNG if they qualify as refugees, but on the other hand they receive information that the highest authorities of the land say this is a misunderstanding. This uncertainty is fueled by the fact that the processing itself is very slow.”²⁸

48. This is also the view of the HRLC.
49. The tension that led to the violence on 16-18 February was an inevitable by-product of the circumstances in which asylum seekers have been transferred and detained. Leaving people locked in harsh conditions for an indefinite amount of time with no certainty about their future is cruel and inherently harmful. The unrest, and therefore its tragic consequences, was both a foreseeable and preventable result.

²⁷ Justice David Cannings, as reported in Liam Fox, ‘Manus Island detention centre ‘very tense’, says PNG judge conducting rights inquiry’, ABC, available at <http://www.abc.net.au/news/2014-03-18/an-manus-island-atmosphere-very-tense/5329420> (accessed 1 May 2015).

²⁸ Press Statement, ‘Preliminary Observations on the official visit to Papua New Guinea by Mr. Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, 3-14 March 2014’, 14 March 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14373&LangID=E>.

4. Involvement and response of Department and Minister

50. This section addresses the HRLC's concerns with Government and Department of Immigration and Border Protection conduct in relation to the incident and the Manus Island RPC more broadly. These concerns are relevant to the following heads of the terms of reference:

- (e) Department of Immigration and Border Protection involvement and response; and
- (g) Minister for Immigration and Border Control's conduct.

4.1 Lack of transparency

51. The HRLC is deeply concerned about the lack of transparency in relation to the Manus Island RPC.

52. Transparency is vital to ensuring scrutiny and accountability for the conditions in which asylum seekers are being detained. It is also vital to the Australian people's ability to evaluate current asylum seeker policy and the manner of its implementation.

53. Prior to the grant of specific orders by the National Court of Papua New Guinea in a recent Court case²⁹, no Australian journalist had been granted access to the RPC. It also took court orders for lawyers from the PNG Public Solicitor's office to be granted access to speak to their clients inside the centre.

54. It is a matter of great concern that achieving this minimal level of access to an Australian built, funded and run facility has taken forceful orders from the National Court of another country.

55. Disturbingly, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, was also denied access to the Manus Island RPC recently. The Special Rapporteur conducted an official visit to Papua New Guinea from 3 - 14 March 2014. He was refused a meeting with private security firm G4S in Port Moresby and Manus Island, and was denied the ability to meet asylum seekers at the RPC on Manus Island.³⁰

56. The Australian Government has maintained that access to the RPC is a matter for PNG. Australia built the centre and underwrites it at considerable taxpayer expense. Asylum seekers

²⁹ Case HROI1 of 2014, National Court of Papua New Guinea.

³⁰ Press Statement, 'Preliminary Observations on the official visit to Papua New Guinea by Mr. Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, 3-14 March 2014', 14 March 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14373&LangID=E>

are only detained therein because Australia sends them there. Australia plainly has a responsibility to push for independent scrutiny of their treatment.

57. The Australian Government should work with PNG to ensure appropriate access, not hide behind PNG sovereignty when access is denied.

4.2 Blaming the victims

58. The violence on 16-18 February and the brutal nature of Reza Berati's death ought to have triggered an urgent review of the role Australia's policies played in causing the tragedy and the improvements necessary to prevent further incidents.

59. Instead, in the immediate aftermath of the incident the Minister of Immigration and Border Protection made comments which appeared to seek to shift blame for the violence to its victims.

60. In an initial media release on 17 February, the Minister stated that "Papua New Guinea police have arrested a number of transferees in relation to the incident".³¹

61. The Minister's statement the following day claimed that the incident involved "transferees breaching internal and external perimeter fences at the centre."³²

62. Late on Saturday 22 February, the Minister issued a correction – the deceased asylum seeker had been beaten and killed inside the RPC.³³

63. Despite the revelation that a man had been killed, the Minister's correction emphasised that "when people co-operate and conduct themselves appropriately within the centre then we are able to provide for their safety" and "where transferees engage in riotous and aggressive behaviour within the centre, this will escalate the risk to those who engage in such behaviour".³⁴

64. There was no direct suggestion that Reza Berati acted in a way which compromised his own safety, but that appears to have been the Minister's implication.

³¹ Minister for Immigration and Border Protection, Media Release, 17 February 2014.

³² Minister for Immigration and Border Protection, Media Release, 18 February 2014, available at <http://www.minister.immi.gov.au/media/sm/2014/sm211867.htm>.

³³ Minister for Immigration and Border Protection, Media Release, 22 February 2014, available at <http://www.minister.immi.gov.au/media/sm/2014/sm212031.htm>.

³⁴ Minister for Immigration and Border Protection, Media Release, 22 February 2014, available at <http://www.minister.immi.gov.au/media/sm/2014/sm212031.htm>.

65. The HRLC is not privy to the information or basis on which the initial statements and subsequent correction by the Minister for Immigration and Border Protection were made. However, their intent and effect seems to have been to attribute blame for the violence to its victims - the asylum seekers detained at the centre.
66. The focus on asylum seekers' behaviour during that important period in the immediate aftermath of the events had the potential to colour subsequent investigations into the events and undermine their perceived independence. Equally, victim-blaming took the place of what ought to have been a comprehensive review by the Government of its own responsibility and the steps to be taken to ensure such events are never repeated.

5. The Government's Responsibilities

67. Australia's legal obligations and responsibilities do not end at its borders. Australia has extraterritorial responsibilities under international law in relation to people within its jurisdiction or effective control.

5.1 Legal basis for extraterritorial obligations

68. Australia is obliged to perform its human rights obligations in good faith.³⁵ It cannot avoid or divert the obligations it has accepted by contracting them out or otherwise.
69. Nor can Australia do offshore things that would violate its international law obligations if done onshore. A key rationale for the extraterritorial application of a country's human rights obligations is that "it would be unconscionable... to permit a State party to perpetrate violations...on the territory of another State, which violations it could not perpetrate on its own territory."³⁶
70. Article 2(1) of the *International Covenant on Civil and Political Rights* has been interpreted as giving the Covenant extraterritorial application. A State party could be in breach of the Covenant if it is a "link in the causal chain" that would make possible violations by another State in another jurisdiction.³⁷
71. More specifically in the context of States responses to refugee flows, the UNHCR has emphasised:

³⁵ Article 26 the *Vienna Convention on the Law of Treaties*.

³⁶ *Lopez Burgos v Uruguay*, Communication No. R.12/52, 29 July 1981 at 12.3.

³⁷ See e.g. *Munaf v Romania*, CCPR/C/96/D/1539/2006, 21 August 2009 at 14.2

States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment.³⁸

5.2 Factual basis for Australia's human rights obligations at the RPC

72. Australia's involvement in the transfer and detention of asylum seekers at the Manus Island RPC is significant:

- (a) Australian authorities transport asylum seekers under their direct control to Papua New Guinea;
- (b) Once asylum seekers arrive in PNG, they are detained at the Manus Island RPC, which is entirely funded by the Australian Government;
- (c) Operational, maintenance and welfare support services are provided by service providers at the Manus Island RPC under contract with the Australian Government;³⁹
- (d) Department of Immigration and Border Protection officials manage the refugee status determination process⁴⁰, and Papua New Guinea's Acting Chief Migration Officer has stated that refugee status determination will require significant support from the Australian Department.⁴¹

73. From the moment they are received by Australian authorities and throughout their detention on Manus, asylum seekers are effectively subject to Australia's jurisdiction and control. That practical reality translates under international law to a legal one, such that Australia retains human rights obligations to asylum seekers it transfers to detention in the Manus RPC.

5.3 Human rights and international law violations

74. The incidents from 16 – 18 February 2014, and the conditions at the Manus Island RPC which contributed to those incidents, represent failures by Australia to meet the following international law and human rights obligations owed to asylum seekers, including:

- (a) the right to life⁴²;

³⁸ UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, pp 8 – 9 (citations omitted).

³⁹ See for example Australian Government Contract Notice ID CN2163702 with Transfield Services (Australia), details available at <https://www.tenders.gov.au/?event=public.cn.view&CNUUID=1013CCBE-92A3-D1D4-722EC39FCBF61B39> (accessed 1 May 2014).

⁴⁰ Amnesty International, *This is Breaking People*, December 2013, p 62

⁴¹ Amnesty International, *This is Breaking People*, December 2013, p 64.

⁴² Article 6, 1966 *International Covenant on Civil and Political Rights (ICCPR)*.

- (b) the freedom from arbitrary detention⁴³;
- (c) the freedom from torture or cruel, inhuman or degrading treatment⁴⁴;
- (d) the prohibition on imposing penalties on asylum seekers on account of illegal entry or presence in a territory⁴⁵; and
- (e) the right of all persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person⁴⁶;

75. Reza Berati's death while in processing centre is a clear violation of his right not to be arbitrarily deprived of his life. Importantly, the right to life, read in conjunction with the right to an effective remedy, also encompasses an obligation to ensure there is an effective and impartial investigation of a death.⁴⁷ The HRLC is concerned that not one person has yet been charged in relation to the violence from 16 – 18 February despite there being a large number of witnesses.
76. The prolonged, mandatory detention at the Manus Island RPC constitutes arbitrary detention under international law.⁴⁸ Immigration detention must be justified as reasonable, necessary and proportionate in light of the individualised circumstances of each asylum seeker in order to be lawful. This has not been demonstrated in relation to individual asylum seekers detained on Manus Island RPC.
77. Further, the arbitrary character of the detention, its protracted (and/or indefinite⁴⁹) duration, the refusal to provide information and procedural rights to detainees and difficult and harsh conditions of detention are inflicting serious psychological harm on asylum seekers.⁵⁰ This

⁴³ Article 9, ICCPR.

⁴⁴ Article 7, ICCPR.

⁴⁵ Article 31(1), *1951 Convention relating to the Status of Refugees* as amended by the *1967 Protocol relating to the Status of Refugees*.

⁴⁶ Article 10, ICCPR.

⁴⁷ See e.g. Article 2(3) in conjunction with Article 6, ICCPR.

⁴⁸ UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 23 to 25 October 2013, 26 November 2013*, p 1

⁴⁹ There are some asylum seekers in the RPC who cannot return to their countries of origin, including Syrians, Somalis, and Rohingya and other stateless groups: Amnesty International, *This is Breaking People*, December 2013, p 66. There is also some uncertainty about the possibility of resettling gay asylum seekers found to be genuine refugees in PNG, given homosexuality is criminalised.

⁵⁰ Amnesty International, *This is Breaking People*, December 2013, pp 52 – 56.

constitutes a violation of the rights of detained people to be treated with respect for the inherent dignity of the person, and not to be subject to inhuman treatment.⁵¹

78. Article 31(1) of the *Refugee Convention* prohibits imposing penalties on asylum seekers on account of illegal entry or presence in a territory. However, Australian law and policy now requires that any asylum seeker who arrives by boat without a visa is subject to mandatory detention and mandatory removal to an offshore processing facility as soon as practicable. Our laws and policies do precisely what Article 31(1) says they can't – penalise asylum seekers on account on account of their attempts to enter Australia without prior approval.
79. Australia's conduct is both unlawful and harmful. The geographic location of those violations does not absolve Australia of responsibility for them.

6. Conclusion: key concerns

80. The unrest of 16-18 February, and its tragic consequences, was both foreseeable and preventable.
81. Australia retains legal responsibility for it.
82. The HRLC recommends closing the Manus RPC and processing asylum seekers onshore in order to ensure their safety and rectify Australia's non-compliance with international law.
83. In the event that the Manus RPC is to remain in operation, Australia must take urgent steps to:
- (a) ensure individuals responsible for acts of violence are held to account;
 - (b) ensure the safety of asylum seekers within the Manus RPC;
 - (c) address the inhuman conditions inside the RPC; and
 - (d) address the inordinate delays in processing and resettlement which underpinned the unrest.

⁵¹ Articles 7 and 10 of the ICCPR. See HRC finding of violation of Article 7 in similar factual scenario, in *F.K.A.G. v Australia*, Communication No. 1781/2008, 26 July 2013.