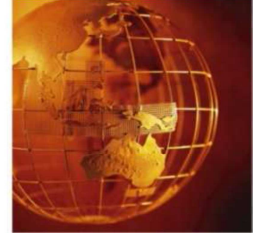




MONASH University
Castan Centre for Human Rights Law



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Submission to the

**LEGAL AND CONSTITUTIONAL AFFAIRS
REFERENCES COMMITTEE**

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

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The Castan Centre for Human Rights Law welcomes the opportunity to make a submission to the Inquiry into the incident at the Manus Island Detention Centre in Papua New Guinea (PNG) from 16 February to 18 February 2014. The Castan Centre's mission includes the promotion and protection of human rights. It is in this context that we make this submission, which seeks to outline Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR) to asylum seekers detained in Manus Island in PNG. This submission focuses on the following term of reference for the Inquiry:

(k) the Australian Government's duty of care obligations and responsibilities

The Extraterritorial Application of the International Covenant on Civil and Political Rights

Australia signed the ICCPR in 1972 and ratified the Covenant in 1980.¹ Australia is, therefore, bound by provisions within the ICCPR. PNG is also a party to the ICCPR. As the Legal and Constitutional Affairs Reference Committee's term of reference (k) is concerned with Australia's duty of care rather than the duty of care of PNG, this submission will limit its enquiry to Australia's obligations under the ICCPR.

Australia is bound by the ICCPR everywhere it exercises jurisdiction. That is, Australia must abide by its obligations under the ICCPR where it exercises power or effective control including in a third country such as PNG. Australia is also bound by its obligations to persons in its jurisdiction regardless of their status. This means that 'unauthorised maritime arrivals',² asylum seekers and refugees have rights under the ICCPR. In the words of the United Nations Human Rights Committee:

The enjoyment of Covenant rights is not limited to citizens of State Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective

¹ The ICCPR entered into force for Australia on 13 November 1980, except article 41, which came into force for Australia on 28 January 1993.

² *Migration Act* 1958, s 5AA.

control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.³

The view that the ICCPR applies wherever a State party exercises jurisdiction is also shared by the United Nations' principal judicial organ, the International Court of Justice.⁴

Australia pays for the detention of asylum seekers in PNG and maintains a permanent presence at the detention facility. Australia also makes decisions about the day-to-day operation of the centre. Therefore, Australia has clear power and effective control in the centre and is bound by its ICCPR obligations there.

It is furthermore established in international jurisprudence that a State's obligation to respect and ensure key human rights, as examined below, extends to taking reasonable steps to prevent situations which could result in a violation of the right.⁵ This obligation extends beyond the conduct of state officials to private actors. As the Inter-American Court of Human Rights has explained:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required.⁶

In order to respect and ensure compliance with its obligations under the ICCPR, Australia is required to take reasonable steps to prevent asylum seekers from being the subject of violations in the detention facility in PNG.

³ Human Rights Committee, *General Comment No 31 Nature of the General Legal Obligation Imposed on State Parties to the Covenant*: UN Doc CCPR/C/21/Rev1/Add.13 (26 May 2004), [10].

⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment, Merits) [2005] ICJ Rep 168, [216].

⁵ See for example *Herrera Rubio v. Colombia*, Communication No. 161/1983, P 12, U.N. Doc. CCPR/C/OP/2 (1987); *Kurt v Turkey* (24276/94) [1998] ECHR 44 (25 May 1998).

⁶ Inter-American Court of Human Rights, Case of *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988 (Merits) [172].

Obligations Under the ICCPR

Australia is in violation of a number of its obligations under the ICCPR in PNG.

Right to Life

States have a positive obligation to prevent the deprivation of life caused by private actors under Article 6 of the ICCPR.⁷ Article 6 of the ICCPR provides:

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.

Australia's failure to prevent the death of Reza Barati places Australia in violation of its obligation to protect the life of the young asylum seeker.

Asylum seekers who witnessed the killing of Reza Barati have reported continuing death threats⁸ and the Minister for Immigration Scott Morrison has admitted that he cannot guarantee the safety of asylum seekers in Manus Island. In an interview with the ABC television program, Four Corners, the Minister stated:

It is absolutely my aspiration, it is my commitment, to ensure that these places are safe, but it is difficult I think to do that in every instance.⁹

Australia cannot continue to detain asylum seekers in Manus Island unless it can ensure the safety of the asylum seekers in every instance. To do so, places Australia at risk of further violating its obligation under Article 6 of the ICCPR.

In addition, it is unlawful to send an individual to a place where his or her life is at risk.¹⁰ This obligation to refrain from *refoulement* or transfer of an asylum seeker to a

⁷ Sarah Joseph, Jenny Shultz and Melissa Castan, *The International Covenant on Civil and Political Right: Cases, Materials, and Commentary* (Oxford University Press, 2nd edn. 2004), 183-184.

⁸ Michael Gordon, 'Manus detainees seek witness protection' (30 April 2014) <<http://www.smh.com.au/federal-politics/political-news/manus-detainees-seek-witness-protection-20140430-zr1vb.html#ixzz30QViVcUY>>.

⁹ ABC Four Corners, *The Manus Solution* (29 April 2014) <<http://www.abc.net.au/4corners/stories/2014/04/28/3991401.htm>>.

¹⁰ *A.R.J v Australia*, Human Rights Committee, UN Doc A/52/40, Vol.II 205 (4 November 1997), [4.3].

place where her or she may be killed is independent of the obligation to protect an individual from death in one's jurisdiction. The relocation of asylum seekers to PNG, where they may be killed, is an additional violation of Article 6 of the ICCPR.

Therefore, in the absence of certainty regarding the safety of asylum seekers in every instance, Australia is prohibited from continuing to detain asylum seekers in PNG and must cease the transfer of any other asylum seekers to the detention center on Manus Island.

Cruel, Inhuman, Degrading Treatment or Punishment

Article 7 of the ICCPR protects asylum seekers from 'torture or to cruel, inhuman or degrading treatment or punishment.'

It has been reported that in addition to the death of Reza Barati, 62 men suffered serious injuries in the events that took place on Manus Island from 16 February to 18 February 2014 including the loss of an asylum seeker's eye and the wounding of a man by gunshot.¹¹ In an interview with Fairfax papers, asylum seekers in Manus Island have claimed that after they were attacked in February the assailants entered their rooms and destroyed everything they had.¹²

These reports indicate that asylum seekers were subject to cruel, inhuman and degrading treatment during the incident at the Manus Island Detention Centre from 16 February to 18 February 2014, in contravention of Article 7 of the ICCPR.

Furthermore, there are reports that asylum seekers remain in fear of violence at the detention facility. Asylum seekers have stated:

¹¹ ABC Four Corners, *The Manus Solution* (29 April 2014) <<http://www.abc.net.au/4corners/stories/2014/04/28/3991401.htm>>.

¹² 'We all know the killer: Manus Island detainee speaks of detention centre attacks that led to Reza Barati's death' *The Sydney Morning Herald* (14 March 2014) <<http://www.smh.com.au/federal-politics/political-news/we-all-know-the-killer-manus-island-detainee-speaks-of-detention-centre-attacks-that-led-to-reza-baratis-death-20140314-34qzd.html#ixzz30Lje4Z1n>>.

There has been no security and, until today, we work shifts to watch over ourselves. We have people stand shift while some rest. One group work the night shift, another group of us do day shift to ensure we don't get attacked again.¹³

The continuing detention of asylum seekers in a place where they live in fear is cruel, inhumane and degrading. As such, the continuing detention of asylum seekers at the centre, following the incident, places Australia in continuing violation of Article 7 of the ICCPR.

The Human Rights Committee has been very clear in its position that the transfer of individuals to a place where they may face cruel, inhuman or degrading treatment is also a breach of Article 7 of the ICCPR.¹⁴ In General Comment No. 20, the HR Committee states that:

In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.¹⁵

Following the admission by the Minister for Immigration, Scott Morrison, that Australia cannot guarantee the safety of asylum seekers on Manus Island, Australia must cease the transfer of asylum seekers to the detention facility in PNG where they are at risk of further cruel, inhuman, degrading treatment or punishment.

Humane Treatment of Detainees

Article 10 of the ICCPR also requires states to treat detainees with 'humanity and with respect for the inherent dignity of the human person'. The Human Rights Committee has stated that 'States parties should ensure that the principle stipulated

¹³ 'We all know the killer: Manus Island detainee speaks of detention centre attacks that led to Reza Barati's death' *The Sydney Morning Herald* (14 March 2014) <<http://www.smh.com.au/federal-politics/political-news/we-all-know-the-killer-manus-island-detainee-speaks-of-detention-centre-attacks-that-led-to-reza-baratis-death-20140314-34qzd.html#ixzz30Lje4Z1n>>.

¹⁴ *Kaba v Canada*, CCPR/C/98/D/1465/2006 (2010), [10.2]- [10.3].

¹⁵ Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, P 5, UN Doc HRI/GEN/1/Rev6, 151 (2003), [9] <<http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>>

[under Article 10 of the ICCPR] is observed in all institutions and establishments within their jurisdiction where persons are being held'.¹⁶

From the facts that have emerged since the events of 16 and 17 February 2014, it appears clear that detainees have not been treated with humanity as required by article 10 of the ICCPR.

Arbitrary Detention

A critical contributing factor to the incident at the Manus Island Detention Centre from 16 February to 18 February 2014 was the detention of asylum seekers in PNG. Australia is prohibited from arbitrarily detaining asylum seekers under Article 9 of the ICCPR which states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

All asylum seekers who arrive in Australia by boat are liable to be transferred to Manus Island (or Nauru) for extraterritorial detention under current Australian policy.¹⁷ The indiscriminate application of a mandatory detention policy has been found by the Human Rights Committee to constitute arbitrary detention. In *A v Australia*, the HR Committee stated that the factors necessitating detention must be 'particular to the individual'.¹⁸

The Human Rights Committee has also expressed the view that 'remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case'.¹⁹ As asylum seekers detained in Manus Island could be released into the community in Australia, the detention of asylum seekers is not 'necessary in all the

¹⁶ Human Rights Committee, *General Comment No 21 Humane Treatment of People Deprived of Liberty*: UN Doc HRI/GEN/1/Rev.1 (10 April 1992), [1].

¹⁷ Australian Broadcasting Corporation, 'Scott Morrison describes 'secrecy with a purpose' in asylum policy', *7:30 Report*, 14 January 2014 (Scott Morrison).

¹⁸ *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), [9.4].

¹⁹ *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), [9.2]. See also *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006), [7.2].

circumstances of the case' and continues beyond any period which could be reasonably justified. It therefore follows that Australia's policy of detaining asylum seekers in Manus Island is arbitrary in contravention of Article 9 of the ICCPR.²⁰

Concluding Remarks

Australia has a duty to care for asylum seekers detained in Manus Island under the ICCPR and these obligations extend to its exercise of jurisdiction in PNG. The incident at the Manus Island Detention Centre from 16 February to 18 February 2014 placed Australia in violation of its obligations to protect the life of asylum seekers (Article 6) ; ensure that they are free from cruel, inhuman or degrading treatment or punishment (Article 7) and are treated with humanity and with respect during their detention (Article 10). The continuing transfer of asylum seekers to Manus Island, despite Australia's acknowledgement that it cannot ensure such violence will not occur again, places Australia in further violation of Articles 6 and 7 of the ICCPR and the conditions at the detention centre are currently such that violate Articles 7 and 10 of the ICCPR. In addition, the arbitrary detention of asylum seekers in Manus Island places Australia in violation of Article 9 of the ICCPR.

In the absence of a guarantee that asylum seekers will be safe in Manus Island, Australia must cease the transfer of asylum seekers to PNG and end the arbitrary detention of asylum seekers. To do otherwise would be to continue to violate its duty of care to asylum seekers under the Covenant.

²⁰ It should be noted that Australia's policy of mandatory immigration detention in Australian territory has also been found to be arbitrary by the Human Rights Committee. See: *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), *C v Australia*, UN Doc. CCPR/C/76/D/ 900/1999 (28 October 2002); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (12 August 2003); *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002 (29 October 2003); *D & E v Australia*, UN Doc CCPR/C/87/D/1050/2002 (11 July 2006); *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006); *Shams v Australia*, UN Doc CCPR/C/90/D/1255 (11 September 2007); *Kwok v Australia*, UN Doc CCPR/C/97/D/1442/2005 (23 November 2009).